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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia corporation,

Petitioner,

versus

RADEC, INC., a West Virginia corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

RICHARD J. BOLEN
Counsel of Record

MELISSA DODD VELTRI
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, LLP
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722
(304) 529-6181
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

I. IS A PUNITIVE DAMAGE AWARD SEVENTEEN (17) TIMES GREATER THAN ACTUAL DAMAGES AWARDED FOR A SINGLE ISOLATED BREACH OF ORAL CONTRACT "GROSSLY EXCESSIVE" AND HENCE VIOLATIVE OF DUE PROCESS?

II. DID THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IN THIS ACTION CONFLICT WITH *BMW OF N. AM., INC. V. GORE*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) AND OTHER RELEVANT DUE PROCESS DECISIONS OF THIS COURT?

LIST OF ALL PARTIES TO THE PROCEEDING

1. Mountaineer Coal Development Company, d/b/a Marrowbone Development Company, a West Virginia corporation, Petitioner.

2. Radec, Inc., a West Virginia corporation, Respondent.

CORPORATE DISCLOSURE STATEMENT

Mountaineer Coal Development Company, d/b/a Marrowbone Development Company is a subsidiary of:

(1) Bluegrass Coal Development Company which is a subsidiary of;

(2) Zeigler Coal Holding Company which is a subsidiary of;

(3) AEI Resources, Inc. which is a subsidiary of;

(4) AEI Resources Holding, Inc.

No publicly held company owns 10% or more of Mountaineer Coal Development Company stock.

Radec, Inc. is believed to be privately owned by a single family.

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Statute:

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OPINIONS BELOW

The orders entered in this action by the Circuit Court of Mingo County, West Virginia, Civil Action No. 97-C-312 are not reported. The "Final Order" of the circuit court is included in the Appendix (Pet. App. 23a). Both the *per curiam* majority opinion of the Supreme Court of Appeals of West Virginia and the separately filed dissenting opinion of Justice Scott in this action styled "Radec, Inc., Plaintiff Below, Appellee, v. Mountaineer Coal Development Company, d/b/a Marrowbone Development Company, Defendant Below, Appellant", No. 27804, are reported at 2000 W.Va. LEXIS 151. A copy of each of the foregoing opinions is included in the Appendix (Pet. App. 1a, 16a).

JURISDICTION

i. The *per curiam* opinion of the Supreme Court of Appeals of West Virginia affirming the judgment of the Circuit Court of Mingo County, West Virginia, was released and filed December 11, 2000 (Pet. App. 1a). The dissenting opinion of Justice Scott was released and filed December 13, 2000 (Pet. App. 16a).

ii. Petitioner Mountaineer Coal Development Company, d/b/a Marrowbone Development Company ("Marrowbone") filed its Petition for Rehearing in the Supreme Court of Appeals of West Virginia, on January 10, 2001. A copy of the Petition for Rehearing is included in the Appendix (Pet. App. 93a). The Petition for Rehearing was refused by that court by order entered January 24, 2001. A copy of the January 24, 2001 order is included in Appendix (Pet. App. 41a).

iii. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1257(a)(1994).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Amendment 14: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

A copy of Amendment 14 is included in the Appendix (Pet. App. 42a).

STATEMENT OF THE CASE

Facts Material to Consideration of the Questions Presented.

Underlying events.

By a series of written contract mining agreements extending over a period of years, Petitioner Marrowbone hired Respondent Radec, Inc. ("Radec") to mine various blocks of coal located in Mingo County, West Virginia. In the last of those contracts, Radec agreed to complete the mining of two of Marrowbone's pre-existing mines which were located immediately adjacent to one another in the same coal seam. After Radec assumed responsibility for these mines, Radec renamed the mines Radec No. 4 and Radec No. 5.

In the process of mining the Radec No. 4 mine, Radec sought and obtained Marrowbone's permission to temporarily shut down the fans and pumps in the Radec No. 5 mine and to remove equipment to be used by Radec in mining the Radec No. 4 mine. As a result of the shutdown of Radec No. 5, the Radec No. 5 mine deteriorated while the Radec No. 4 mine was being mined. When the mining of Radec No. 4 was successfully and profitably completed by Radec, Radec asked Marrowbone to reimburse the costs

of the needed rehabilitation of Radec No. 5. Marrowbone agreed to do that. It was undisputed that Marrowbone honored its promise and did, in fact, reimburse Radec for all such rehabilitation costs to the extent that Radec contemporaneously invoiced Marrowbone for those rehabilitation expenses. Long after the rehabilitation work was completed and after this action was filed, Radec, at the suggestion of its counsel, sought reimbursement from Marrowbone for an additional $89,629.89 of claimed rehabilitation expenses which had not previously been submitted to Marrowbone.

In addition to seeking reimbursement for the additional $89,629.89 in rehabilitation expenses, Radec claimed it was entitled to recover the profits it anticipated earning from mining a separate block of coal reserves known as the Drautz property. Radec contended that it was entitled to recover these anticipated profits because, according to Radec's witnesses, Marrowbone officials had promised Radec that it would be allowed to mine the Drautz property in exchange for Radec's promise to finish mining the Radec No. 5 mine. Although Radec had communicated with Marrowbone in writing on various occasions in the past, Radec wrote no letter to Marrowbone confirming the alleged promise regarding mining the Drautz property. Likewise, Radec produced no other written corroboration of any nature for the alleged oral contract.

The written agreement applicable to the Radec No. 5 mine contained a 30 day cancellation provision. According to Radec's witnesses, Radec had threatened to invoke its right of termination but ultimately agreed it would not exercise that right in exchange for Marrowbone's alleged promise to allow Radec to mine the Drautz property. Marrowbone's witnesses denied that Radec had ever been promised the Drautz property or that Radec had ever threatened to quit mining the Radec No. 5 mine. It was

undisputed that Radec completed mining the Radec No. 5 mine. It was also undisputed that Marrowbone paid Radec the full consideration specified in the written contract mining agreement in connection with Radec's completion of the mining of Radec No. 5 plus the additional reimbursement of rehabilitation expenses which were contemporaneously invoiced to Marrowbone.

Jury Award.

Beyond claiming breach of Marrowbone's agreement to reimburse rehabilitation expenses and breach of the alleged separate promise regarding mining the Drautz property, Radec claimed that Marrowbone's conduct amounted to fraud. Over repeated objections by Marrowbone, the jury was instructed that, if they found fraud, they could award punitive damages in addition to compensatory damages. The jury subsequently returned a compensatory damage award in the precise amount of the claimed additional rehabilitation expenses of $89,629.89. In addition, the jury awarded punitive damages of $1,541,638.00. The jury did not return a compensatory damage award in connection with Radec's claim of lost profits on the Drautz property.

Post-trial Proceedings.

In addition to making the usual post-trial motions, i.e., renewed motion for judgment as a matter of law and/or for a new trial and/or for a remittitur, Marrowbone also separately moved the trial court to conduct a "meaningful and adequate review" of the punitive damage award under *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). *Garnes* requires a nine (9) step analysis similar to and modeled after Alabama's *Green Oil*[1] standards[2]

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[1] *Green Oil Co.* v. *Hornsby*, 539 So.2d 218 (Ala. 1989).

[2] *See Garnes*, 413 S.E.2d at 909.

which were approved by this Court in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). *See infra*.

The nine (9) *Garnes* factors consist of five factors that must be included in all West Virginia punitive damage instructions (but weren't in the case at bar), plus four additional factors which are (1) the cost of the litigation; (2) any criminal sanctions imposed on the defendant for his conduct; (3) any other civil actions against the same defendant based on the same conduct; and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. *See*, Syl.Pts. 3, 4, and 5, *Garnes*. Although all four (4) of these additional factors are based, in whole or in part, on facts not in evidence thereby necessitating a post-trial hearing, no such hearing was held by the trial court in the case at bar. *See Garnes*, 413 S.E.2d at Syl.Pt. 5. Instead, the trial court entered a single Final Order overruling all post-trial motions (Pet. App. 23a). However, the trial court's Final Order did not address all nine (9) of the required *Garnes* factors. Among other things, the Final Order failed to analyze whether there was evidence in the record of "actual intention to cause harm" or "actual evil intention" necessary, under West Virginia law, to justify a punitive damage award greater than five (5) times the amount of compensatory damages. *See TXO Prod. Corp.* v. *Alliance Res. Corp.*, 187 W.Va. 457, 419 S.E.2d 870, Syl.Pt. 15 (1992), *aff'd* 509 U.S. 443 (1993).

Appellate Proceedings.

The jury's 17 to 1 punitive damage award was affirmed on appeal by the *per curiam* opinion of the Supreme Court of Appeals of West Virginia (Pet. App. 1a), with Justice Scott "emphatically" dissenting:

> "I respectfully but emphatically dissent from the majority opinion. In conclusory fashion, and with limited

> evaluation of the issues, the majority affirms the submission of the punitive damages issue to the jury, finds no flaw in the failure to provide the jury with a Garnes instruction, and approves the jury's punitive damage award in the ratio of 17:1 to the compensatory award. I differ with the majority on each of these issues and deem the resulting affirmance of a $1.5 million punitive award appalling under the circumstances of this case and destructive of the public reputation of the judicial proceeding." (Pet. App. 16a).

In its Petition for Rehearing, Marrowbone pointed out to the Supreme Court of Appeals of West Virginia several material misstatements of fact contained in the majority's *per curiam* opinion (Pet. App. 93a), but to no avail.

When and How the Constitutional Issue Was Raised and Ruled Upon

The issues now presented for this Court were raised in the court of first instance by Marrowbone in "Defendants' Motion for Review of Punitive Damage Award", "Memorandum in Support of Defendants' Motion for Review of Punitive Damage Award", "Defendants' Renewed Motion for Judgement as a Matter of Law and/or for a New Trial and/or for a Remittitur", and "Defendants' Memorandum in Support of Its Renewed Motion for Judgement as a Matter of Law and/or for a New Trial and/or for a Remittitur." Copies of the foregoing documents are included in the Appendix (Pet. App. 107a, 108a, 112a, 114a).

The issues were also fully raised and briefed in the Supreme Court of Appeals of West Virginia. A copy of the Brief of Appellant is included in the Appendix (Pet. App. 43a). The specific relevant points, as stated in Marrowbone's brief in the Supreme Court of Appeals, were these:

> "(2) The trial court's admitted failure to properly instruct the jury as to punitive damages under Garnes

> and TXO, resulted in a constitutionally defective charge[.]
>
> (3) The trial court erred (a) in failing to make a 'meaningful and adequate review' of the jury's punitive damage award and (b) in failing to set aside or reduce that award[.]
>
> (a) The trial court's analysis of the punitive damage award was constitutionally flawed under Garnes-TXO and federal due process standards[.]
>
> (b) When properly reviewed, it is obvious that the punitive damage award was 'grossly excessive' and thus constitutionally flawed[.]" (Pet. App. 45a) (upper case modified and emphasis omitted).

In support of the foregoing arguments before the Supreme Court of Appeals of West Virginia, Marrowbone cited the relevant decisions of this Court, i.e., *Pacific Mut. Life Ins. Co.* v. *Haslip*, *supra*, *TXO Prod. Corp.* v. *Alliance Res. Corp.*, *supra*, and *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (Pet. App. 43a). However, the *per curiam* opinion of the Supreme Court of Appeals of West Virginia addressed and rejected all of Marrowbone's arguments without citing or discussing any of the relevant decisions of this Court. Although the majority opinion strangely omitted any discussion of the federal constitutional issues, Justice Scott, in his dissent, expressly recognized the constitutional flaws in the majority opinion. First, Justice Scott noted that *Haslip* requires "'a reasonable constraint on jury discretion . . .'" and found none in this case:

> "There was no reasonable constraint in this case; in fact, there was no constraint at all." (Pet. App. 18a).

Justice Scott then concluded that the omission of the required *Garnes* elements in the punitive damage instructions given to the jury resulted in "a constitutionally defective jury charge which denied due process[.]" (Pet. App. 20a). Finally, after criticizing the majority for excus-

ing "this error of constitutional magnitude" and finding that there was no "particularly egregious or evil behavior" contained in the record in this action, Justice Scott stated:

> "Had the majority of this Court engaged in a thorough and exhaustive review of all aspects of this punitive damage award, as required by Garnes, I cannot fathom how it could have justified its decision to affirm. Where is any evidence which would justify any reasonable jury to find 'actual evil intention' on the part of Marrowbone? . . . I cannot find any. I would reverse, based upon the absence of the Garnes instruction, and hold that an instruction on punitive damages which does not include the Garnes factors [is] per se reversible. It is the obligation of the court, regardless of the requests or objections of counsel, to ensure that the constitutional mandate of due process inherent in any award of punitive damages be protected. Thus, I dissent." (Pet. App. 22a).

ARGUMENT

I. The 17 to 1 punitive damage award in the case at bar fails to pass constitutional muster when analyzed under the three "guideposts" established in *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

The majority opinion in *Gore*, 517 U.S. 559, identified three "guideposts" to be examined in determining whether a particular punitive damage award violates due process: (1) degree of reprehensibility of the defendant's conduct, (2) disparity between actual or potential harm and the punitive damage award, and (3) difference between the punitive damage award and civil or criminal penalties authorized or imposed for comparable misconduct. *See* 517 U.S. at 575-83.

Degree of reprehensibility.

Although the plaintiff in *Gore* contended that BMW's deliberate concealment of the repainting of damaged ve-

hicles, subsequently sold as new, constituted fraud, the majority of this Court found "none of the aggravating factors associated with particularly reprehensible conduct[.]" 517 U.S. at 576. Dr. Gore, in his attempts to condemn BMW's concealment as fraudulent, lay particular emphasis on the fact that there was strong evidence that BMW had repeatedly and deliberately engaged in the same conduct as part of "a nationwide pattern of tortious conduct." 517 U.S. at 576. The majority of this Court agreed that, under the relevant decisions of this Court, "a recidivist may be punished more severely than a first offender [because] repeated misconduct is more reprehensible than an individual instance of malfeasance." 517 U.S. at 577 (citation omitted).

Very significantly, in the case at bar, there is no evidence in the record that Marrowbone ever engaged in any conduct similar to that alleged in this action at any other time before or since. At worst, Marrowbone's failure to deliver the Drautz property was "an individual instance of malfeasance." 517 U.S. at 577.

In discussing degree of reprehensibility, the *Gore* majority further noted that there were, in that case, "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." 517 U.S. at 579. The *Gore* majority reasoned that "the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars" was "sufficiently reprehensible to give rise to tort liability and even a modest award of exemplary damages," but found that such conduct "does not establish the high degree of culpability that warrants a substantial punitive damages award." 517 U.S. at 580.

The "false statements", "affirmative misconduct", and "concealment" absent in *Gore* are also absent in the case at

bar. Although under Radec's theory of the case Marrowbone broke its oral promise to allow Radec to mine the Drautz property, there was no contention that Marrowbone misrepresented any existing fact, i.e., that Marrowbone made a "false statement" of existing fact. Precisely, because of that deficiency in the proof, Marrowbone vigorously argued both in the trial court and in the Supreme Court of Appeals of West Virginia that there had been no proof of fraud. Marrowbone also cited Syl.Pt. 3 of *Croston* v. *Emax Oil Co.*, 195 W.Va. 86, 464 S.E.2d 728 (1995) which states:

> "Fraud cannot be predicated on a promise not performed. To make it available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or his property." (emphasis added).

Notwithstanding this well-settled principle of the common law which the majority's *per curiam* opinion simply ignored, the Supreme Court of Appeals of West Virginia adopted Radec's theory of the case.[3]

In addition to failing to establish proof of any misrepresentation of an existing fact, Radec also failed to prove any damages resulting from the alleged fraud which, under West Virginia law, is one of the essential elements of fraud. *See Bowling* v. *Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 472, 425 S.E.2d 144, 148 (1992). Although Radec alleged in its Complaint that Radec had mined the Radec No. 5 mine at a financial loss in reliance on the promise of being allowed to mine the Drautz property, Radec offered

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[3] As discussed at some length in Marrowbone's Petition for Rehearing in the Supreme Court of Appeals of West Virginia, a number of the "facts" upon which the majority's *per curiam* opinion relied in finding evidence of fraud are not facts at all and are not supported by a review of the record (Pet. App. 93a).

no evidence at trial that it had actually incurred a financial loss in mining Radec No. 5. In fact, rather than attempting to prove that it had suffered a loss in mining Radec No. 5, i.e., a loss incurred in reliance on a misrepresentation, Radec merely attempted to prove that Marrowbone's breach of its alleged promise to allow Radec to mine the Drautz property resulted in lost profits. The jury, however, rejected that claim and awarded damages solely for breach of Marrowbone's promise to reimburse Radec for the additional $89,629.89 of rehabilitation expenses.

In addition to no evidence of fraud or fraud damages, there has never been any contention in this action and no finding in the lower courts of "concealment of evidence of improper motive." *See Gore*, 517 U.S. at 579. In actuality, it is obvious from an examination of the record that there was no tangible evidence to conceal. Although Radec both combed through literally hundreds of Marrowbone documents and Radec, of course, maintained its own files with respect to Radec's dealings with Marrowbone, no single scrap of paper was ever found which either directly or indirectly supported Radec's allegation of an oral promise regarding Radec mining the Drautz property.[4]

Absent clear and convincing proof of fraud or some other independent tort, there was simply no basis for any punitive damage instructions being given to the jury and no basis for any punitive damage award being made by the jury, much less one 17 times greater than compensatory damages. As the plurality of this Court noted in *TXO*,

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[4] In short, as Marrowbone argued before the Supreme Court of Appeals of West Virginia (Pet. App. 43a), absent corroboration, there was no clear and convincing proof of fraud as required by West Virginia law. *See, e.g., Bowling* v. *Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144, 148 (1992).

West Virginia law allows punitive damages only ""where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear . . . ."" 509 U.S. at 452 n. 15 (citations omitted).[5] No such proof exists in the record of this case. As Justice Scott stated in his dissent in this action:

> "I fail to discern any factual basis to support the determination that the Appellant acted maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that the lower court apparently perceived in the present case." (Pet. App. 16a) (footnote omitted).

Even assuming the validity of all of Radec's evidence, the reprehensibility of Marrowbone's conduct was very arguably substantially less than that of BMW in *Gore*. *See Gore*, 517 U.S. 559.

Ratio of punitive damage award to actual or potential harm.

In *Gore*, the majority noted that:

> "[t]he second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." 517 U.S. at 580 (citations omitted).

The *Gore* majority quickly explained that both actual and potential harm must be considered. *See* 517 U.S. at 581 (quoting *TXO*, 509 U.S. at 460 and *Haslip*, 499 U.S. at 21). By way of example, the *Gore* majority noted that, in *TXO*, although the ratio of punitive damages to actual harm was

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[5] *Mayer* v. *Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) remains the law of West Virginia regarding the type of conduct which gives rise to punitive damages. *See Haynes* v. *Rhone-Poulenc, Inc.*, 206 W.Va. 18, 35, 521 S.E.2d 331, 348 (1999).

in excess of 500 to 1, "the relevant ratio was not more than 10 to 1", because the harm to the victim would have been much greater "if the tortious plan had succeeded." *Gore*, 517 U.S. at 581 (emphasis added).

In the case at bar, according to Radec's theory, Marrowbone's plan did succeed. According to Radec, Marrowbone successfully induced Radec into completing the mining of the Radec No. 5 mine by using the promise of the Drautz property as a "carrot". Thus, in the case at bar, because all of the potential harm was actually incurred by Radec, actual harm and potential harm are the same and, more importantly, the ratio is the same – 17 to 1. Thus, the 17 to 1 ratio in the case at bar is substantially greater than the 10 to 1 ratio allowed to stand by this Court in the *TXO* decision and the "close to the line" 4 to 1 ratio approved in *Haslip*. *See TXO,* 509 U.S. at 466; *Haslip*, 499 U.S. at 23-24. The 17 to 1 ratio in the case at bar, is, of course, less than the 35 to 1 ratio disapproved in *Gore,* 517 U.S. at 582.

Sanctions for comparable misconduct.

The *Gore* majority discussed and compared the punitive damage awards in both *Haslip* and *Gore* with the fines and other punishment which could have been imposed for the wrongs alleged in those actions. *See Gore*, 517 U.S. 583-85. It has never been suggested in this action by Radec, the trial court, or the Supreme Court of Appeals of West Virginia, that even Radec's version of Marrowbone's conduct would warrant either civil or criminal penalties. Suffice it to say, for present purposes, that there is no known civil or criminal penalty which could have been imposed against Marrowbone for failing to deliver on its alleged promise to allow Radec to mine the Drautz property.

II. Under the two-prong analysis advocated by Justice Breyer in *Gore*, the punitive damage award in this action would likewise fail to pass constitutional muster.

Justice Breyer concurred in the *Gore* majority's decision to overturn the punitive damage award because that award:

> "was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) grossly excessive in light of the State's legitimate punitive damages objectives." 517 U.S. at 595.

Those observations apply equally to the facts of the case at bar.

Lack of significant constraints.

As Justice Breyer discussed at some length, the constitutional infirmity of the punitive damage award in *Gore* resulted not from the fact that Alabama had failed to adopt appropriate constraints, but rather from the fact that the Alabama courts "applied the 'factors' intended to constrain punitive damages awards in a way that belies that purpose." 517 U.S. at 588 (citation omitted). Justice Breyer's detailed analysis of the *Green Oil* factors adopted in Alabama is particularly relevant in the case at bar because West Virginia modeled its *Garnes* factors[6] after the Alabama *Green Oil* factors in the wake of this Court's decision in *Haslip*, *supra*.

It is submitted that the Supreme Court of Appeals of West Virginia and the Circuit Court of Mingo County, West Virginia have done in this case precisely what the Alabama courts did in *Gore* – ignored in actual practice the

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[6] *See Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

previously adopted constitutional constraints. As Justice Breyer observed with respect to the Alabama courts, "as the [West Virginia] courts have authoritatively interpreted [the *Garnes* factors], and as their application in this case illustrates, they impose little actual constraint." 517 U.S. at 589.

The first factor discussed by Justice Breyer and one of the most significant constraints on punitive damage awards under both *Garnes* and *Green Oil* is the requirement that such awards "bear a reasonable relationship to actual and potential harm". *See Garnes*, 413 S.E.2d 897; *Green Oil*, 539 So.2d 218. In fact, the *Garnes* decision expressly requires that the jury be so instructed. *See*, Syl.Pts. 3, 4, and 5, *Garnes, supra*. However, the jury was not so instructed in the instructions drafted and delivered by the trial court in the case at bar. Radec proposed, and later withdrew, punitive damage instructions which included some of the *Garnes* factors. Had the trial court adopted Radec's proposed instructions, the jury would have been instructed as to at least some of the *Garnes* factors. However, the trial court proceeded to deliver instructions to the jury which were totally devoid of the *Garnes* factors.

Although the majority of the Supreme Court of Appeals of West Virginia in its *per curiam* opinion recognized that "[t]he trial court *did not* specifically cite the *Garnes* factors when instructing the jury on punitive damages[,]" (Pet. App. 9a) they cavalierly ignored that defect by concluding that "Marrowbone invited the error by objecting to such an instruction being given." (Pet. App. 10a). Marrowbone did in fact consistently object to any punitive damage instructions being given because there was no proof of fraud or other independent tort warranting punitive damage instructions in the case at bar. Nonetheless, the fact that Marrowbone vehemently objected to the giving of punitive damage instructions when such instructions were not war-

ranted cannot be construed as "inviting" the trial court to give constitutionally defective punitive damage instructions.

On appeal below, the Supreme Court of Appeals of West Virginia also adopted Radec's theory that Marrowbone waived any objection as to the propriety of the trial court's punitive damage instructions under *Garnes* because Marrowbone failed to specifically object to the absence of the *Garnes* factors therein (Pet. App. 9a-11a). However, as Justice Scott pointed out in his dissent, "[a]lleged errors of a constitutional magnitude will generally trigger a review by this Court under the plain error doctrine." (Pet. App. 20a) (citation omitted). As Justice Scott recognized, "the omission of the Garnes instruction created a constitutionally defective jury charge which denied due process . . . " (Pet. App. 20a). However, despite such plain error, the majority never ruled on the substance of this issue, deeming it to have been waived (Pet. App. 10a). Thus, under the guise of waiver, the Supreme Court of Appeals of West Virginia ignored previously adopted constitutional constraints on punitive damage awards and summarily discarded this issue without conducting a due process analysis.

Another of both the *Green Oil* and *Garnes* factors discussed by Justice Breyer is the "financial position" of the defendant. *Gore*, 517 U.S. at 591. As recognized by Justice Breyer, rather than acting as a constraint on punitive awards, this factor often "provides an open-ended basis for inflating awards when the defendant is wealthy[.]" 517 U.S. at 591. Therefore, it is particularly important that a jury not be given misleading financial information. In the case at bar, no proper evidence of Marrowbone's "financial position" was presented to the jury. Instead, Radec was permitted to introduce, over repeated objections, statistics showing that Marrowbone had achieved gross sales in excess of $800,000,000.00 over a period of six (6) years. Gross sales in no way reflect the "financial position" of a defen-

dant[7] and there was no evidence presented regarding whether Marrowbone actually made any profit on those sales. The fact that the jury was allowed to consider evidence of $800,000,000.00 in gross sales and that Radec's counsel argued Marrowbone had "made" $800,000,000.00 in his closing argument to the jury may very well account for the jury's grossly excessive punitive damage award in this case.

The majority of the Supreme Court of Appeals of West Virginia excuses the trial court's decision to allow the introduction of gross sales revenues by adopting Radec's theory "that Marrowbone refused to provide more accurate financial information during discovery[,]" (Pet. App.14a) and because "the information submitted to the jury actually came from information Marrowbone supplied to Radec." (Pet. App.14a). It is true that Marrowbone, in written discovery responses, objected to providing financial information primarily on the grounds that Radec's requests for such information were not timely served and that such information was irrelevant in a breach of contract action. However, Radec could have moved to compel discovery of this information but failed to do so. Thus, Radec waived any legitimate complaint it might otherwise have had with respect to Marrowbone's failure to produce that financial information. More importantly, the gross sales statistics that were ultimately introduced to the jury did not come "from information Marrowbone supplied to Radec." (Pet. App. 14a). Rather, Radec obtained that gross sales information via subpoena from a third party.

Additional *Green Oil* factors noted by Justice Breyer in the *Gore* decision were the "costs of litigation" and "crimi-

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[7] Amazon.com has achieved millions in sales, but is still losing money.

nal sanctions". *See* 517 U.S. at 591. Although both factors are also *Garnes* factors which, pursuant to *Garnes*, should have been the subject of a post-trial hearing by the trial court, they weren't. *See*, Syl.Pts. 3, 4, and 5, *Garnes, supra*. There was no evidence in the record regarding those factors in the case at bar and, none was accepted by the trial court at the post-judgment review stage. Thus, those factors could not have been properly applied by the West Virginia courts in regard to the subject punitive damage award. Again, the West Virginia courts ignored in actual practice previously adopted constitutional constraints.

In addition to discussing the specific Alabama *Green Oil* standards, Justice Breyer also attempted to discern any other standard which might have served to constrain the *Gore* punitive damage award but found none. The same holds true in the case at bar. As with the Alabama courts in *Gore*, the West Virginia courts in this case not only failed to apply the *Garnes* factors, but they also:

> "neither referred to, nor made any effort to find, nor enunciated any other standard that either directly, or indirectly as background, might have supplied the constraining legal force that the . . . *Green Oil* [*Garnes*] standards (as interpreted here) lack." *Gore*, 517 U.S. at 592 (emphasis added).

For example, Justice Breyer noted that an economic theory similar to that argued in *Gore*, in certain circumstances, might provide a significant constraint on arbitrary awards. *See* 517 U.S. at 592-93. However, as in *Gore*, the record in the case at bar "contains nothing suggesting that the [West Virginia] Supreme Court, when determining the allowable award, applied *any* 'economic' theory that might explain the [$1.5] million recovery." 517 U.S. at 593.

Justice Breyer likewise looked for any community understanding or historic practice that the *Gore* award might exemplify and which would provide background standards

constraining arbitrary behavior and excess awards. *See Gore,* 517 U.S. at 594-95. To paraphrase Justice Breyer, "[a] punitive damages award of [$1.5] million for intentional misrepresentation causing [$89,629.89] of harm is extraordinary by historical standards, and . . . finds no analogue until relatively recent times." 517 U.S. at 594. However, there is no evidence in the record of the case at bar regarding community understanding or historic practice which could have been taken into consideration by the West Virginia courts.

Additionally, as in Alabama, West Virginia has "no other legislative enactments here that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards." 517 U.S. at 595.

Thus, applying Justice Breyer's *Gore* analysis, it is clear the West Virginia courts allowed the subject punitive damages to be awarded against Marrowbone, without constitutionally sufficient constraints. In the apt words of West Virginia Supreme Court Justice Scott, "[t]here was no reasonable constraint in this case; in fact, there was no constraint at all." (Pet. App. 18a).

Disproportionality between the award and legitimate punitive damages objectives.

Finally, it is submitted that West Virginia has no "legitimate punitive damages objectives" in an action in which the only "wrong" found by the jury was Marrowbone's breach of its agreement to fully reimburse Radec for its rehabilitation costs. There was no gross fraud, malice, oppression or wanton, willful or reckless misconduct. Thus, there was no justification for punitive damages instructions at all and no legitimate State interest in allowing such severe economic punishment.

CONCLUSION

Regardless of which of the two analytical frameworks advocated in *Gore* is applied to the facts of the case at bar, the result is the same. The jury's $1.5 million punitive damage award which was seventeen (17) times greater than actual compensatory damages is "grossly excessive" and violative of due process.

Respectfully submitted,

RICHARD J. BOLEN
Counsel of Record
MELISSA DODD VELTRI
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN, LLP
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

Counsel for Petitioner Mountaineer Coal Development Company, d/b/a Marrowbone Development Company

APPENDIX

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2000 Term

No. 27804

RADEC, INC., - - - - *Plaintiff Below, Appellee,*

v.

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, - *Defendant Below, Appellant.*

Appeal from the Circuit Court of Mingo County
Honorable Michael Thornsbury, Judge
Civil Action No. 97-C-312

AFFIRMED

Submitted October 24, 2000
Filed December 11, 2000

COUNSEL: Richard J. Bolen, Huddleston, Bolen, Beatty, Porter & Copen, Huntington, West Virginia, Attorney for the Appellant; Robert A. Taylor, Rachael S. Carrico, Masters & Taylor, Charleston, West Virginia, Attorneys for the Appellee.

The Opinion of the Court was delivered Per Curiam.

JUSTICE SCOTT dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and

false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Syllabus point 1, *Lengyel* v. *Lint,* 167 W. Va. 272, 280 S.E.2d 66 (1981).

2. "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syllabus point 6, *Tennant* v. *Marion Health Care Foundation, Inc.,* 194 W. Va. 97, 459 S.E.2d 374 (1995).

3. "A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syllabus point 1, *Maples* v. *West Virginia Department of Commerce,* 197 W. Va. 318, 475 S.E.2d 410 (1996).

4. "The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional." Syllabus point 15, *TXO Production Corp.* v. *Alliance Resources Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (1992).

5. "A judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syllabus point 7, *Torrence* v. *Kusminsky,* 185 W. Va. 734, 408 S.E.2d 684 (1991).

Per Curiam:

Mountaineer Coal Development Company, d/b/a Marrowbone Development Company (hereinafter referred to as "Marrowbone"), appellant/defendant below, appeals from an adverse jury verdict entered in the Circuit Court of

Mingo County. The jury awarded Radec, Inc. (hereinafter referred to as "Radec"), appellee/plaintiff below, $89,629.89 in compensatory damages. Additionally, the jury awarded to Radec $1,541,638.00 in punitive damages. Marrowbone asserts assignments of error related to the following topics: (1) the submission of a fraud theory to the jury; (2) the jury instructions on punitive damages; (3) the trial court's review of the punitive damage award; (4) the excessiveness of the punitive damages; and (5) the admission of certain evidence regarding finances and the mentioning of a non-union coal operation. Based upon the parties' arguments on appeal, the record designated for appellate review, and the pertinent authorities, we affirm the decision of the Circuit Court of Mingo County.

I.

FACTUAL AND PROCEDURAL HISTORY

This case arises from a 1991 written mining contract between Marrowbone and Radec. Under the terms of the contract, Radec agreed to mine coal from two separate mines owned by Marrowbone. The two mines were designated as Radec No. 4 and Radec No. 5. Under the terms of the contract, Radec No. 4 was to be mined first. The mining of Radec No. 5 would not begin until one-and-one-half years later. However, this time frame was extended after Marrowbone requested that Radec mine additional coal reserves adjacent to Radec No. 4. As a result of the additional work, Radec did not complete work at Radec No. 4 until December of 1995, some four years later.

In May of 1995, Radec was prepared to begin mining preparations for Radec No. 5. Due to the unexpected delay in getting to Radec No. 5, a great deal of deterioration had occurred. Approximately twenty-million gallons of water had flooded Radec No. 5, which caused 1,800 feet of the mine's ceiling to fall. The additional cost for rehabilitating Radec No. 5 was not part of the original written contract between Radec and Marrowbone. However, because of Marrowbone's request for additional work on Radec No. 4, and the resulting delay of the start up on of Radec No. 5, Marrowbone orally agreed to reimburse Radec for the cost

of rehabilitating Radec No. 5.

Eventually, Marrowbone rejected paying to Radec the amounts requested by Radec for rehabilitating Radec No. 5. Radec then concluded that, as a result of Marrowbone's refusal to pay all of the rehabilitation costs for Radec No. 5, it would no longer be profitable for Radec to remove coal from Radec No. 5. Under the terms of the original written contract between Radec and Marrowbone, Radec could terminate its obligation to work Radec No. 5 by providing 30 days notice to Marrowbone. Radec gave no such notice to Marrowbone. Instead, Radec continued to work Radec No. 5 after Marrowbone orally agreed to permit Radec to additionally mine a profitable site known as the Drautz property.

Radec was finishing its work on Radec No. 5 in September of 1996 when Marrowbone advised Radec that Radec would not be allowed to mine the Drautz property. Radec subsequently filed this civil lawsuit in July, 1997. The suit alleged causes of action for breach of an oral contract and fraud.[1]

The case was tried before a jury. On June 2, 1999, the jury returned a verdict against Marrowbone in the amount of $89,629.89 as compensatory damages, and $1,541,648.00 as punitive damages. Following the trial court's denial of Marrowbone's post-trial motions, Marrowbone filed this appeal.

II.

STANDARD OF REVIEW

We are asked to determine whether the trial court committed error by denying Marrowbones post-trial motion for a new trial. As a general matter, we indicated in Syllabus point 4 of *Sanders* v. *Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976) that "although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's

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1 Additional facts of the case are discussed in the body of the opinion.

ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." We have held more specifically regarding appellate review of a motion for a new trial:

> In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. pt. 3, *State* v. *Vance*, __ W. Va. __, 535 S.E.2d 484 (2000). Accord *Lipscomb* v. *Tucker County Comm'n*, 206 W. Va. 627, 630, 527 S.E.2d 171, 174 (1999); *Coleman* v. *Sopher*, 201 W. Va. 588, 605, 499 S.E.2d 592, 609 (1997); *Tennant* v. *Marion Health Care Found.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). It is based upon these standards that we review this appeal.

III.

DISCUSSION

A. Fraud Theory

Marrowbone contends that the trial court should not have submitted Radec's fraud theory of liability to the jury. Marrowbone asserts that Radec failed to put forth sufficient evidence of fraud for the jury to consider.[2] We have

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[2] Radec contends that this issue was waived by Marrowbone, because Marrowbone failed to properly move the trial court for judgment as a matter of law at the close Radec's case-in-chief, or at the close of all the evidence. We have recognized that "'even if a motion for a new trial is made for insufficiency of the evidence, the failure to move for a [judgment as a matter of law] forecloses the question on appeal. A party may not gamble on the verdict and later question the sufficiency of the evidence.'" *Chambers* v. *Smith*, 157 W. Va. 77, 80, 198 S.E.2d 806, 809 (1973) (quoting 2B Barron & Holtzoff, *Federal Practice and Procedure* § 1081). We have reviewed the motions made by Marrowbone at the close of Radec's case-in-chief and at the close of all the evidence. We find the motions were adequate to preserve the issue for appellate review.

held that "the essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Syl. pt. 1, *Lengyel* v. *Lint,* 167 W. Va. 272, 280 S.E.2d 66 (1981). Accord *Kessel* v. *Leavitt,* 204 W. Va. 95, 127, 511 S.E.2d 720, 752 (1998); Syl. pt. 2, *Bowling* v. *Ansted Chrysler-Plymouth-Dodge, Inc.,* 188 W. Va. 468, 425 S.E.2d 144 (1992); Syl. pt. 2, *Muzelak* v. *King Chevrolet, Inc.,* 179 W. Va. 340, 368 S.E.2d 710 (1988).

We have further held that " 'when the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right of recovery, the trial court should direct a verdict in favor of the defendant.' Syl. pt. 3, *Roberts* v. *Gale,* 149 W. Va. 166, 139 S.E.2d 272 (1964)." Syl. pt 1, *Brannon* v. *Riffle,* 197 W. Va. 97, 475 S.E.2d 97 (1996). However, it is equally well established that a claim should go to the jury unless manifest insufficiencies in the evidence compel otherwise. Accordingly, it has long been the rule in this jurisdiction that "'before directing a verdict in a defendant's favor, every reasonable and legitimate inference favorable to the plaintiff fairly arising from the evidence, considered as a whole, should be entertained by the trial court, and those facts should be assumed as true which the jury may properly find under the evidence.' Syl. pt. 1, *Fielder* v. *Service Cab Co.,* 122 W. Va. 522, 11 S.E.2d 115 (1950)." Syl. pt. 9, *Casto* v. *Martin,* 159 W. Va. 761, 230 S.E.2d 722 (1976). Accord Syl. pt. 1, *Blake* v. *John Skidmore Truck Stop, Inc.,* 201 W. Va. 126, 493 S.E.2d 887 (1997). In our review of the record, we are left with little doubt that sufficient evidence was adduced by Radec to warrant the fraud claim being submitted to the jury.[3]

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[3] Marrowbone contends that, since the jury should not have considered the fraud theory of liability, the trial court committed error by instructing the jury on punitive damages. This issue is without merit insofar as this Court finds the evidence was sufficient to submit the fraud claim to the jury.

To begin, a Radec official, Richard Goff, testified that a Marrowbone official, Howard Epperly, promised to let Radec mine the Drautz property if Radec continued to rehabilitate and mine Radec No. 5. Goff further testified that another Marrowbone official, John Faulconer, took Radec officials to see the Drautz property. Mr. Goff clearly testified that Radec would not have continued to rehabilitate and mine Radec No. 5 had Marrowbone not promised to permit Radec to mine the Drautz property.

The Evidence presented by Radec suggested that it was reasonable for Radec to rely on such a promise, because Radec had done business with Marrowbone for almost twenty years. Moreover, Marrowbone made additional representations to Radec regarding Marrowbone's preparation of the necessary paperwork to secure governmental approval for mining the Drautz property.

In contrast, John Faulconer testified that Marrowbone had never actually considered letting Radec mine the Drautz property.[4] Other evidence suggested that Marrowbone had been considering mining the Drautz property itself. There was also evidence indicating that a mining application for the Drautz property was initially filed under the name of Marrowbone, but was later transferred to that of the Heritage Corporation. The mining application for the Drautz property was never listed in the name of Radec.

To support their damage claim, Radec produced testimony from Mr. Goff, Ms. Kay Parsley, bookkeeper, and Mr. Drew Baldock, accountant. Those witnesses testified that Radec was financially ruined as a result of its reliance on Marrowbone's promise to allow Radec to mine the Drautz property. There was evidence that Radec incurred debts totaling $1.1 million dollars in rehabilitation costs relating to Radec No. 5. Additionally, Radec lost all of its mining

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[4] Mr. Faulconer's deposition was read to the jury in lieu of live testimony.

equipment due to its inability to make loan payments on the equipment.

It is clear from the above evidence that it was proper to allow Radec's fraud theory to go to the jury. There were "various legitimate inquiries proper for jury resolution regarding [Radec's theory of fraud.]" *Brannon* v. *Riffle,* 197 W. Va. 97, 101, 475 S.E.2d 97, 101 (1996). This Court has held that "upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence.' Syl., *Nichols* v. *Raleigh-Wyoming Coal Co.,* 112 W. Va. 85, 163 S.E. 767 (1932)." Syl. pt.1, *Totten* v. *Adongay,* 175 W. Va. 634, 337 S.E.2d 2 (1985).

B. Punitive Damages Instructions

Next, Marrowbone contends that the trial court committed error in failing to fully instruct the jury on punitive damages as provided by our case law. We have held that:

> The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.

Syl. pt. 6, *Tennant* v. *Marion Health Care Found., Inc.,* 194 W. Va. 97, 459 S.E.2d 374 (1995).

With respect to instructing the jury on punitive damages, we held in syllabus point 3 of *Garnes* v. *Fleming Landfill, Inc.,* 186 W. Va. 656, 413 S.E.2d 897 (1991):

When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the

defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

The record is clear. The trial court did not specifically cite the *Garnes* factors when instructing the jury on punitive damages. Radec contends that this Court should not consider the issue for two reasons. First, Radec argues that Marrowbone did not raise an objection to the trial court regarding the absence of the *Garnes* factors in the jury instructions. Radec points out that Rule 51 of the West Virginia Rules of Civil Procedure provides that "no party may assign as error the giving or the refusal to give an instruction unless the party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party ob-

jects and the grounds of the party's objection[.]" Accord Syl. pt 5, *Page* v. *Columbia Natural Resources, Inc.,* 198 W. Va. 378, 480 S.E.2d 817 (1996); Syl. pt. 1, *Shia* v. *Chvasta,* 180 W. Va. 510, 377 S.E.2d 644 (1988).

Second, Radec points out that it tendered to the trial court an instruction containing the Garnes factors. However, Marrowbone objected to the giving of any punitive damages instruction.[5] Radec argues that Marrowbone should now not be allowed to raise the issue as error, because Marrowbone invited the error by objecting to such an instruction being given. Our cases are clear in holding that "[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syl. pt. 1, *Maples* v. *West Virginia Dep't of Commerce,* 197 W. Va. 318, 475 S.E.2d 410 (1996). "A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal." Syl. pt. 4, *State* v. *Johnson,* 197 W. Va. 575, 476 S.E.2d 522 (1996).

For the reasons provided by Radec and our decisions on invited error, the *Garnes* jury instruction issue will not be addressed by this Court.[6] Moreover, it has been noted that a defendant "'cannot . . . be allowed to alter retroactively [his] trial strategy.' " *McDougal* v. *McCammon,* 193 W. Va. 229, 239, 455 S.E.2d 788, 798 (1995) (quoting

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[5] Marrowbone's objection was as follows: "We object. You've covered punitive damages repeatedly in your charge. We've objected to it, but—"

[6] Marrowbone assets that this error mandates reversal of the trial court based upon the plain error doctrine. We will not invoke the plain error doctrine to examine an error that was not only not objected to, but was actually invited. It was noted in *State* v. *Knuckles,* 196 W. Va. 416, 421, 473 S.E.2d 131, 136 (1996), that "waiver necessarily precludes salvage by plain error review." *But see State* v. *Redden,* 199 W. Va. 660, 487 S.E.2d 318 (1997) (using plain error to address an invited error issue that involved a fundamental right secured by the state and federal constitutions).

DeBenedetto v. *Goodyear Tire & Rubber Co.*, 754 F.2d 512, 518 (4th Cir.1985)).

C. Punitive Damage Award

Marrowbone contends that the trial court failed to conduct a meaningful and adequate review of the punitive damage award as required by our case law. This Court provided guidelines for reviewing a punitive damage award in Syllabus point 4 of *Garnes* v. *Fleming Landfill, Inc.*, *supra*, as follows:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

We have reviewed the trial court's order. We disagree with Marrowbone's contention that the order fails to demonstrate a meaningful review. We find the order shows the trial court gave full consideration to the amount of the punitive damage award and the evidence adduced at trial.

D. Excessive Punitive Damages

Marrowbone contends that the punitive damage award was grossly excessive.

This Court observed in Syllabus point 1 of *Garnes* v. *Fleming Landfill, Inc.*, in part, that "punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions."[7] We elaborated on the issue of the reasonableness of a punitive damage award in syllabus point 15 of TXO Prod. *Corp.* v. *Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), as follows:

> The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.[8]

(Footnote added).

We have considered the issues raised by the parties as it relates to trial evidence and the punitive damage award in this case. We agree with Radec that the evidence of Marrowbone's fraudulent conduct warranted the amount of punitive damages awarded in this case. It is clear from

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[7] In syllabus point 5 of *Garnes* we held:

Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

[8] Marrowbone points out that the ratio between the punitive and compensatory damages awards is seventeen to one.

the evidence that Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5. Additionally, Marrowbone plainly knew it would benefit from Radec's work on Radec No. 5. In order to reap this benefit, Marrowbone deceived Radec into believing that it would be given the profitable Drautz property to mine after completing work on Radec No. 5. Marrowbone never intended to turn over the Drautz property to Radec. Marrowbone's actions were "evil" and self-serving.

E. Admission of Evidence

Marrowbone assigns error to the admission of two types of evidence. With regard to the admission of evidence, we have held that

> The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admission of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.

Syl. pt. 9, *Tudor* v. *Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997). It has also been made clear by this Court that "[a] judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." Syl. pt. 7, *Torrence* v. *Kusminsky,* 185 W. Va. 734, 408 S.E.2d 684 (1991).

To begin, Marrowbone argues that the trial court committed error in admitting evidence illustrating Marrowbone's financial situation. Marrowbone concedes that under *Garnes* v. *Fleming Landfill, Inc., supra,* evidence of its financial position is relevant. However, Marrowbone contends that Radec's evidence, showing gross revenues over a six-year period, did not reflect Marrowbone's true financial position.

Radec notes initially that Marrowbone did not object to the evidence on the grounds of accuracy during the trial. Marrowbone sought to keep the evidence out on the ground

that it was not relevant. Next, Radec points out that Marrowbone refused to provide more accurate financial information during discovery. Further, the information submitted to the jury actually came from information Marrowbone supplied to Radec.

Insofar as Marrowbone supplied Radec with the financial information introduced at trial, but failed to challenge that information at trial with more accurate data that it possessed, we find no merit to this issue. Marrowbone cannot withhold requested information and then complain about the accuracy of information it supplied. "It is fundamental that a defendant must live by his trial decisions." *State* v. *Knuckles,* 196 W. Va. 416, 421, 473 S.E.2d 131, 136 (1996). *See also McDougal* v. *McCammon,* 193 W. Va. 229, 238, 455 S.E.2d 788, 797 (1995) ("As a general rule, wrongfully secreting relevant discovery materials makes it inequitable for the withholder to obtain the benefit of a favorable verdict.").

Marrowbone also assigned error to the admission of evidence regarding the mentioning of a non-union company. Radec contends, and we agree, that this evidence was relevant as corroborative and impeachment evidence.

Radec presented evidence indicating the circumstances surrounding Marrowbone's promise to let Radec mine the Drautz property. Marrowbone's Howard Epperly denied ever promising to let Radec mine the Drautz property. However, evidence presented by Radec revealed that Epperly had stated, before Radec was promised it would mine the Drautz property, that the Drautz property was going to be conveyed to a non-union company. This evidence served to both impeach Epperly and corroborate Radec's rendition of what was promised and said by Marrowbone.[9] "Our prior cases have permitted the attacking

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[9] Marrowbone also asserted several assignments of error regarding Radec's contract claim, including accord and satisfaction, and a jury instruction on constructive fraud. We need not address these issues insofar as we have found that the fraud theory supported the verdict in this case.

party to admit evidence that, if credited by the jury, would raise doubts about a prior witness's testimony." *McDougal* v. *McCammon,* 193 W. Va. 229, 236, 455 S.E.2d 788, 795.

IV.

CONCLUSION

In view of the foregoing, the judgment of the circuit court is affirmed.

Affirmed.

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 27804

RADEC, INC.

v.

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company

DISSENTING OPINION—Filed December 13, 2000

SCOTT, Justice, dissenting:

I respectfully but emphatically dissent from the majority opinion. In conclusory fashion, and with limited evaluation of the issues, the majority affirms the submission of the punitive damages issue to the jury, finds no flaw in the failure to provide the jury with a *Garnes* instruction, and approves the jury's punitive damage award in the ratio of 17:1 to the compensatory award. I differ with the majority on each of these issues and deem the resulting affirmance of a $ 1.5 million punitive award appalling under the circumstances of this case and destructive of the public reputation of the judicial proceeding.

I. Submission to the Jury

An initial inquiry is whether the lower court erred in allowing the issue of punitive damages to go to the jury. This Court has explained that a lower court must evaluate the issue of whether a jury can consider an award of punitive damages in light of the following question:

> Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could . . . reach[ ] a verdict against the [defendant] on the issue of punitive damages?

Alkire v. *First Nat. Bank of Parsons,* 197 W. Va. 122, 129, 475 S.E.2d 122, 129 (1996); see also *Haynes* v. *Rhone-Poulenc, Inc.,* 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999). I fail to discern any factual basis to support the determina-

tion that the Appellant acted maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that the lower court apparently perceived in the present case.[1]

II. Failure to Provide Garnes Instruction

Assuming for the sake of argument that the punitive damage issue was properly submitted to the jury, such presentation imposed upon the lower court the obligation to accurately and fully instruct the jury with regard to punitive damages. The majority correctly acknowledges that the lower court provided the jury with a punitive damage instruction; however, the majority ends its analysis too quickly, failing to recognize that the lower court told the jury only half the story.[2] The general punitives instruction was given, but the *Garnes* enunciation of factors to be utilized in determining an appropriate amount of damages was not provided. Thus, the jury was left with a standardless punitive damage instruction, failing to provide a framework for the punitive damages determination and omitting even the most basic tenet that, "as a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." *Garnes,* 186 W. Va. at 658, 413 S.E.2d at 899, syl. pt. 3, in part. The lower court painted only a portion of the whole portrait. Its limited recitation of the law on punitives did not adequately reflect West Virginia law or properly guide the jury in its determination of punitives.

The *Garnes* factors are not so easily disregarded. Based upon the United States Supreme Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip,* 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), establishing due pro-

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[1] This "issue of whether there is sufficient evidence to justify an award of punitive damages is a question of the law" for the court. *Marshall* v. *El Paso National Gas Co.,* 874 F.2d 1373, 1384 (10th Cir. 1989).

[2] The lower court, in its final order, admitted that the Garnes instruction should have been given: "The court agrees with defendant that the Garnes instruction should have been given to the jury in this case. However, the court finds that the failure of giving the instruction did not lead to plain error with an outrageous result."

cess standards for punitive damage awards,[3] the Garnes decision establishes a process for awarding and reviewing a punitive damages issue: "Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion. . . ." *Garnes*, 186 W. Va. at 658, 413 S.E.2d at 899, syl. pt. 2, in part. There was no reasonable constraint in this case; in fact, there was no constraint at all.

Garnes also provided the following guidance regarding the jury instructions at syllabus point three, as follows:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

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[3] This Court observed in *Garnes* that the United States Supreme Court in Haslip "attempted to establish criteria for determining whether a particular punitive damages award is outside legitimate due process boundaries." *Garnes*, 186 W. Va. at 660, 413 S.E.2d at 901.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Garnes, 186 W. Va. at 658-59, 413 S.E.2d at 899-900.

The Appellant objected to providing the jury with punitive damage instructions, including the *Garnes* instruction, presumably as part of a trial strategy to limit emphasis upon the jury's opportunity to award punitives. No objection was raised to the failure of the lower court to give the instruction. While I am committed to the concept that a litigant should not be permitted to slumber on his rights or invite an error, I am equally committed to the fundamental right to a fair trial, necessitating clear and complete jury instructions. This Court has invoked the plain error doctrine to correct egregious errors denying the litigants the right to a fair trial, even where no objection was raised to the error below. As we stated in syllabus point one of *Shia* v. *Chvasta,* 180 W. Va. 510, 377 S.E.2d 644 (1988),

> "No party may assign as error the giving or the refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection; but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made subject of an objection." Rule 51, in part, *W. Va. RCP.*

Of course, not all instructional errors warrant intervention by means of the plain error doctrine. "'Where an objection is made to an instruction for the first time on appeal and such instruction is not so deficient so as to require invocation of the "plain error" rule, in consonance with Rule 51, W.Va.R.C.P., this Court will not consider the

late objection.' Syl. Pt. 1, *Jordan* v. *Bero,* 158 W. Va. 28, 210 S.E.2d 618 (1974)." Syl. Pt. 1, *Muzelak* v. *King Chevrolet, Inc.,* 179 W. Va. 340, 368 S.E.2d 710 (1988).

I believe that the omission of the *Garnes* instruction created a constitutionally defective jury charge which denied due process and which warrants intercession through the plain error doctrine. "Alleged errors of a constitutional magnitude will generally trigger a review by this Court under the plain error doctrine." *State* v. *Salmons,* 203 W. Va. 561, 571, 509 S.E.2d 842, 852, n.13. In syllabus point seven of *State* v. *Miller,* 194 W. Va. 3, 459 S.E.2d 114 (1995), this Court stated: "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."

III. Excessiveness

The majority excuses this error of constitutional magnitude and proceeds to summarily dismiss the Appellant's contention that the punitive damage award was excessive. The excessiveness was, in all likelihood, a direct result of the failure of the lower court to provide the jury with the proper guidelines for the award of punitives, as contained in the omitted *Garnes* instruction. The majority once again launches its examination properly but ultimately falls short of a complete analysis. Indeed, as the majority cites, syllabus point fifteen of *TXO Products Corp.* v. *Alliance Resources Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (1992), provides the proper origin for our inquiry, as follows:

> The outer limit of the ratio of punitives to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

This Court's guidelines in *Garnes* impose an obligation upon the trial court to conduct a review of the punitive damages award. Syllabus point four provides:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

Garnes, 186 W. Va. at 659, 413 S.E.2d at 900, syl. pt. 4.

In *BMW of North America, Inc.* v. *Gore,* 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), the United States Supreme Court explained that the trial courts, in scrutinizing the constitutionality of a punitive damage award, must review the ratio of the punitive damage award as compared to the actual harm to the plaintiff as reflected in the compensatory damage award. *Id.* at 582. A high ratio may be justifiable where a defendant's acts are particularly egregious, as determined in *Parrott* v. *Carr Chevrolet, Inc.,* 156 Ore. App. 257, 965 P.2d 440 (1998), *rev. allowed,* 328 Ore. 418, 987 P.2d 511 (1999), concluding that repeated trade practices supported a $300,000

punitives award with only $ 11,000 in compensatory damages. Where there is no evidence of particularly egregious or evil behavior, however, there is simply no justification for a high ratio. *See Jensen* v. *Medley,* 170 Ore. App. 42, 11 P.3d 678, 689 (2000) (reducing punitive award where "the ratio of punitive damages to noneconomic damages in this case is about 35:1; no special circumstances are present in this case that justify an exceptionally high ratio of punitive damages in relation to compensatory damages").

The evaluation of the punitive damage award does not end at the trial court level. This Court is also obligated to conduct an evaluation, as explained in syllabus point five of Garnes:

> Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

Garnes, 186 W. Va. at 659, 413 S.E.2d at 900, syl. pt. 5. Had the majority of this Court engaged in a thorough and exhaustive review of all aspects of this punitive damage award, as required by *Garnes,* I cannot fathom how it could have justified its decision to affirm. Where is any evidence which would justify any reasonable jury to find "actual evil intention" on the part of Marrowbone? 187 W. Va. at 461, 419 S.E.2d at 874, syl. pt. 15, in part. I cannot find any. I would reverse, based upon the absence of the *Garnes* instruction, and hold that an instruction on punitive damages which does not include the Garnes factors in per se reversible. It is the obligation of the court, regardless of the requests or objections of counsel, to ensure that the constitutional mandate of due process inherent in any award of punitive damages be protected. Thus, I dissent.

IN THE

CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No. 97-C-312

RADEC, INC., a West Virginia Corporation, - - - - - - - - - - *Plaintiff,*

v.

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia Corporation, - - - - - - *Defendants.*

FINAL ORDER—Entered October 12, 1999

This decision pertains to the Defendants' Motion for Judgment as a Matter of Law, and/or for a New Trial and/or for a Remittitur and the Plaintiff's Motion for an Additur. A hearing was conducted and oral arguments presented pertaining to said motion. This Court has reviewed all pertinent legal documents of record, the applicable legal authorities, and has considered the oral arguments presented by the parties. Based upon the foregoing deliberations, and for the purposes of this decision, the Court makes the following Findings of Fact, Conclusions of Law and Decision, to wit:

Findings of Fact

1. A jury trial was conducted on Plaintiff's claims of fraud and breach of contract on May 25, 1999, and concluding on Wednesday, June 2, 1999 when the jury returned a verdict for the Plaintiff.

2. The jury's verdict, returned on a general verdict form tendered by defense counsel, was for compensatory damages in the amount of $89,629.89 and punitive damages in the amount of $1,541,648.OO, for a total award of $1,631,277.89.
3. There is no evidence that the jury based its award of damages on an error in calculation.
4. The Defendant failed to ask for the jury to make a special finding upon the separate counts in Plaintiff's Complaint by interrogatory, or otherwise, and tendered a general verdict form over the form submitted by the Plaintiffs, which included the separate counts that Plaintiff asserted against the Defendant.
5. The pertinent evidence at trial pertaining to the Plaintiff's breach of contract claim included, inter alia, the following: evidence of definite and ascertainable material terms of the oral contract, the contract price agreed upon by the parties, and the mining method to be used by the Plaintiff; in addition to the location of where the mining was to take place, the duration of the mining, and testimony concerning the financial strain on Plaintiff as a result of its reliance upon its oral contract with the Defendant.
6. The pertinent evidence at trial pertaining to the Plaintiff's fraud claim included, inter alia, the following: testimony concerning the Plaintiff's actions in preparation of mining, which began in 1995 and continued through 1997, pursuant to the Defendant's misrepresentations; testimony that the promise to Plaintiff by Defendant of a more profitable mine was false, and that Plaintiff's reliance upon Defendant's misrepresentation was reasonable; testimony that the Defendant failed to retract its promise until Plaintiff was already damaged and the Defendant had profited; testimony concerning Defendant's words and actions leading the Plaintiff to believe that the Plaintiff would be mining the property in question; evidence of Defendant's intention of never allowing Plaintiff to mine said property, etc.

Conclusions of Law

A.

Standards for Granting Motion for Judgment as a Matter of Law, for a New Trial and for a Remittitur

1. In deciding whether to grant a motion for judgment as a matter of law, all evidence must be considered in the light most favorable to the plaintiffs; all conflicts in the evidence are assumed to have been resolved by the jury in the plaintiffs' favor, all facts which plaintiffs' evidence tended to prove are deemed proven, and plaintiffs are entitled to the benefit of all favorable inferences which reasonable may be drawn from the facts proven. Syllabus Pt. 1, *Finley* v. *Norfolk & Western Railway Co.*, 1999 WL 503837 (W.Va. July 15, 1999) (per curiam).

2. A motion for a judgment notwithstanding the verdict (now called a motion for judgment as a matter of law) is governed by a different standard than a motion for a new trial. This Court "...[m]ay only enter judgment notwithstanding the verdict when 'the facts and inferences point so strongly and overwhelmingly in favor of the movant that no reasonable jury could have reached a verdict against the movant" '. *Gonzalez* v. *Conley*, 199 W.Va. 288, 291, 484 S.E.2d 171, 174 (1997) *citing Alkire* v. *First National Bank of Parsons*, 197 W.Va. 122, 128, 475 S.E.2d 122, 128 (1996).

3. A motion for a new trial may be granted: "If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice...". *Gonzalez* v. *Conley*, 199 W.Va. 288, 291, 484 S.E.2d 171, 174(1997).

4. Further, in *Orr* v. *Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), cert. Denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984), the Supreme Court held that:

   > [W]here a jury returns a general verdict in a case involving two or more liability issues and

its verdict is supported by the evidence on at least one issue, the verdict will not be reversed, unless the defendant has requested and been refused the right to have the jury make special findings as to his liability on each of the issues.

5. The legal rule concerning the discretion of the trial court to set aside a jury verdict and grant a motion for remittitur is set forth in *Addair* v. *Majestic Petroleum Co., Inc.* 160 W.Va. 105, 232 S.E.2d 821(1997) as follows:

   Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.

6. More particularly, with respect to a motion for remittitur based upon an excessive punitive damage award, the Supreme Court of Appeals of West Virginia set forth the following elements for a court to review in Syl. Pt. 3 of *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. *656,* 413 S.E.2d 897 (1991):

   (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be much greater.

   (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable ef-

> forts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) if the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant.
>
> * * * * *
>
> When the trial court reviews an award of punitive damages, the court should consider the factors explained to the jury [as set forth hereinabove] as well as the following other factors...
>
> (1) The costs of litigation. (We want to encourage plaintiffs to bring wrongdoers to trial);
>
> (2) Any criminal sanctions imposed on the defendant for his conduct. (Any sanctions should mitigate the punitive damages award);
>
> (3) Any other civil actions against the same defendant, based on the same conduct. (Any other awards should mitigate the punitive damages award.); and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Garnes, 186 W.Va. at 668.

7). With respect to review for purposes of an additur, such an award is only appropriate where the record clearly shows that the jury's award of damages was based upon some error in calculation. *See, Bressler* v. *Mull's Grocery Mart* 194 W.Va. 618, 461 S.E.2d 124 *(1995).* Otherwise, a jury's award

will not be disturbed since it is within the jury's province to assess appropriate damages in accordance with whatever weight it gives to testimony concerning damages. *Id.* at 128.

B.

Errors Asserted by the Defendant in Support Of Defendant's Motions for Judgment as a Matter Of Law and/or for a New Trial and/or for a Remittitur

The Defendant has asserted numerous grounds and errors in support of it's Motions for Judgment as a Matter of Law and/or for a New Trial and/or for a Remittitur. In order to ensure that each of the Defendant's grounds or assertions are addressed, this Court will treat each separately in this Order.

a). Is the Defendant Entitled to Judgment as a Matter of Law Because the Facts and Inferences at Trial Point so Strongly and Overwhelmingly in Favor of the Defendants that no Reasonable Jury Could Have Reached a Verdict for the Plaintiffs?

1. Considering all evidence in a light most favorable to Plaintiffs, assuming all conflicts in evidence were resolved by the jury in Plaintiffs' favor, deeming all facts which the Plaintiffs' evidence tended to prove as proven, and conferring upon the Plaintiffs the benefit of all favorable inferences which may have been reasonably drawn from the facts proven, this Court is of the opinion that a reasonable jury could clearly have reached a verdict for the Plaintiffs.

2. The Plaintiffs introduced, inter alia, evidence pertaining to definite and ascertainable material terms of the oral contract, the contract price agreed upon by the parties, and the mining method to be used by the Plaintiff, in addition to the location of where the mining was to take place, the duration of the mining, and testimony concerning the financial strain on Plaintiff as a result of its reliance upon its oral contract with the Defendant; the Plaintiff's actions in preparation of mining, which began in

1995 and continued through 1997, pursuant to the Defendant's misrepresentations; testimony that the promise to Plaintiff by Defendant of a more profitable mine was false, and that Plaintiff's reliance upon Defendant's misrepresentation was reasonable; testimony that the Defendant failed to retract its promise until Plaintiff was already damaged and the Defendant had profited; testimony concerning Defendant's words and actions leading the Plaintiff to believe that the Plaintiff would be mining the property in question; and evidence of Defendant's intention of never allowing Plaintiff to mine said property, etc.

3. The evidence introduced by the Defendants may have been in conflict with evidence introduced by the Plaintiffs, but it certainly did not rise to being so strongly and overwhelmingly in their favor that a reasonable jury could not have rendered a verdict in favor of the Plaintiffs.
4. Therefore, based upon the foregoing, the same is hereby DENIED.

b). Is the Defendant Entitled to a New Trial Due to the Court's Refusal to Grant the Defendant's Motion for Judgment as a Matter of Law on Grounds That the Plaintiffs Oral Contract Theory Was Barred by the Statute of Frauds and in Instructing the Jury on an Oral Contract Theory in Absence of a Finding by the Court That Clear and Convincing Evidence Existed on Said Theory?

1. Initially, the Court points out that the Defendant failed to request a specific finding with regard to whether or not the Court found "clear and convincing" evidence of the existence of an oral contract when the Court denied the Defendant's Motion for Judgment as a Matter of Law on the Plaintiff's breach of contract claim. Therefore, the Defendant has waived this argument.
2. Furthermore, as ruled hereinabove, this Court is of the opinion that the Defendant's assertions fail to rise to the standard necessary for the Court to

grant Defendant's Motion for Judgment as a Matter of Law.

3. Nevertheless, the Court has undertaken the weighing of evidence introduced at trial and has considered the credibility of the witnesses. The Court finds that the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice. Further, the Court finds that "clear and convincing" evidence of an oral contract existed precluding application of the statute of frauds set forth in West Virginia Code 55-1-1(f) (1923), and that the issue of breach of contract was properly submitted to the jury. *Thompson* v. *Stuckey*, 171 W.Va. 483, 300 S.E.2d 295 (1983).

4. Furthermore, the Plaintiff introduced evidence that the Defendant used fraud to induce the Plaintiff into the oral contract. Therefore, the Defendant may not assert the statute of frauds as a defense. *See, Janssen* v. *Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952); *Coston* v. *Emar Oil Co.*, *195* W.Va. 86, 464 S.E.2d 728 (1995); *Bennet* v. *Charles Corp.*, 159 W.Va. 705, 226 S.E.2d *559* (1976).

5. Lastly, the Defendant's failure to request that the jury make special findings pertaining to the Defendant's liability on the separate claims asserted by the Plaintiff precludes reversal of the jury's verdict since the verdict is supported by the evidence of record, at minimum, on the Plaintiff's fraud claim. *See, Orr* v. *Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

6. Therefore, based upon the foregoing, the Court finds that the Defendant's Motion for a New Trial based upon the grounds asserted herein are without merit and the Defendant's Motion is DENIED.

c). Is the Defendant Entitled to a New Trial Due to the Court's Refusal to Grant the Defendant's Motion for Judgment as a Matter of Law on the Plaintiff's Theory of Fraud?

1. The Defendant asserts that the Court erred in failing to Grant the Defendant's Motion for Judgment as a Matter of Law on the Plaintiff's Theory of Fraud because the Plaintiff failed to show by clear and Convincing evidence that the Defendant intended not to fulfill its promise to the Plaintiff at the time the promise *was* made citing, *Croston* v. *Emax Oil Co., a Virginia corporation*, 195 W.Va. 86, 464 S.E.2d 728 (1995).
2. The Defendant has waived its argument on this issue due to its failure to move for a directed verdict on this claim. *See, Chambers* v. *Smith*, 157 W.Va. 77, 198 S.E.2d 806 (1973).
3. Furthermore, as ruled hereinabove, this Court is of the opinion that the Defendant's assertions fail to rise to the standard necessary for the Court to grant Defendant's Motion for Judgment as a Matter of Law.
4. Nevertheless, the Court has undertaken the weighing of evidence introduced at trial and has considered the credibility of the witnesses. The Court finds that the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice. Further, the Court finds that "clear and convincing" evidence was introduced at trial showing that the Defendant made promises to the Plaintiff with no intention of fulfilling those promises. *Croston* v. *Emax Oil Co.. a Virginia corporation*, *195* W.Va. 86, 464 S.E.2d 728 (1995). The Court also finds that sufficient evidence of fraud damages exist to support the jury's verdict.
5. Based upon the foregoing, the Defendant's argument that it should be granted a new trial based upon its assertion herein is without merit, and the Court DENIES Defendant's Motion for a New Trial on this basis.

d). Is the Defendant Entitled to a New Trial Based Upon the Court's Instruction to the Jury on Punitive Damages?

1. The Defendant asserts that the Court erred in failing to include the entirety of the recommended instruction contained the case, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). However, after the Court denied the Defendant's objection to the inclusion of any punitive damages instruction, the Defendant failed to either move to amend or alter the instruction included in the global jury charge and the Defendant failed to offer its own instruction on punitive damages.
2. If a party fails to offer an instruction on a point of law, he cannot complain about the absence of such an instruction except when there is plain error with an outrageous result requiring court intervention to do justice. *Berkeley Homes. Inc.* v. *Radosh*, 172 W.Va. 683,310 S.E.2d 210 (1983).
3. The Court agrees with Defendant that the *Garnes* instruction should have been given to the jury in this case. However, the Court finds that the failure of giving the instruction did not lead to plain error with an outrageous result. As will be addressed later in this decision, the Court is of the opinion that, based upon the evidence of record, the jury's punitive damages award passes the scrutiny of a *Garnes* review.
4. Based upon the foregoing, the Court finds that this asserted basis for a new trial is without merit. Accordingly, the Defendant's Motion based upon the same is DENIED.

e). Is the Defendant Entitled to a New Trial Based Upon the Court's Denial of the Defendant's Motion in Limine to Prohibit the Plaintiff From Introducing Documents Showing the Defendant's Gross Income or Revenue for Purposes of Proving Fraud Damages?

1. The Defendant's income was relevant to the issue of punitive damages in accordance with *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) and Rule 403 of the West Virginia Rules of Evidence.

2. Further, the probative value of said evidence to the issue for which it was being admitted to show outweighed the prejudice, if any, to the Defendant.
3. The Defendant produced information concerning its gross income and revenues during discovery, but failed to produce information concerning its net worth. Therefore, the information that the Plaintiff introduced was that which the Defendant provided during discovery. Further, the Defendant had the opportunity during trial to present evidence of its actual financial position, but, for whatever reason, failed to do so. Perhaps this information was sufficiently prejudicial for the Plaintiff to avoid both producing it during discovery and at trial.
4. Therefore, based upon the foregoing, the Court finds that this asserted basis for a new trial is without merit, and the Defendant's motion on said basis is DENIED.

f. Is the Defendant Entitled to a New Trial By Virtue of the Court's Decision to Instruct the Jury on Punitive Damages Due to an Absence of Evidence of Gross Fraud, Malice, Oppression, or Wanton, Wilful or Reckless Conduct or Criminal Indifference to Civil Obligations Affecting the Rights of Others?

1. The Court has undertaken the weighing of evidence introduced at trial and has considered the credibility of the witnesses. The Court finds that the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice.
2. As set forth hereinabove, the Court has found that clear and convincing evidence of fraud existed for submission to the jury. Further, the jury was instructed on the jurisprudence associated with awarding punitive damages and there existed sufficient evidence of record to establish: "...[g]ross fraud, malice, oppression, or wanton, wilful, or reck-

less conduct or criminal indifference to civil obligations affecting the rights of others,..." satisfying the requirements for assessing punitive damages as set forth in *Alkire* v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

3. Therefore, the Court finds that this asserted basis for a new trial is without merit and the Defendant's Motion for a New Trial based upon the same is hereby DENIED.

g). Is the Defendant Entitled to a Remittitur Because the Punitive Damage Award Fails to Bear a Reasonable Relationship to the Compensatory Award?

1. The award to the Plaintiff in this matter does not appear "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption". *Addair* v. *Majestic Petroleum* Co., Inc., 160 W.Va. 105, 232 S.E.2d 821 (1997).

2. In reviewing whether or not a punitive award is, excessive, the Supreme Court of Appeals of West Virginia set forth the following elements for the trial court in Syl. Pt. 3 of *Garnes* v. *Fleming Landfill. Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991):

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be much greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the

harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

* * * * *

When the trial court reviews an award of punitive damages, the court should consider the factors explained to the jury [as set forth hereinabove] as well as the following other factors...

(1) The costs of litigation. (We want to encourage plaintiffs to bring wrongdoers to trial);

(2) Any criminal sanctions imposed on the defendant for his conduct. (Any sanctions should mitigate the punitive damages award);

(3) Any other civil actions against the same defendant, based on the same conduct. (Any other awards should mitigate the punitive damages award.); and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff

Garnes, 186 W.Va. at 668.

3. In summary, the Court finds that the evidence supports the Plaintiff's position that the harm likely to occur, in addition to the harm actually incurred

as a result of the Defendant's conduct would be grievous. Further, the evidence of record indicates that the Defendant failed to make reasonable efforts to correct the damage done or make amends to the Plaintiff when liability should have become clear. The evidence also supports the Plaintiff's assertion that the Defendant profited from its wrongdoing and that the punitive damage award properly appears to remove that profit. Moreover, under the circumstances of this case, the Court finds that the punitive damages award bear a reasonable relationship to the compensatory award. The award is not unreasonable or monstrous given what's known from the record about the Defendant's financial position. And, lastly, none of the factors which would work to mitigate a punitive damages award, such as prior criminal sanctions, other similar civil actions, and reasonable attempts at settlement appear present in this case.

4. Therefore, based upon the foregoing analysis, the Court finds that this basis for the Defendant's Motion to Set Aside the Verdict or for a Remittitur is without merit, and the same is hereby DENIED.

h). Is the Defendant Entitled to a New Trial Due to the Court's Denial of the Defendant's Motion for Judgment as Matter of Law concerning the Plaintiff's Claim for Rehabilitation Expenses?

1. The Defendant asserts that it is entitled to a New Trial because the Plaintiff's claim for rehabilitation expenses was barred by the doctrine of accord and satisfaction.
2. As stated hereinabove, this Court is of the opinion that the Defendant's assertions fail to rise to the standard necessary for the Court to grant Defendant's Motion for Judgment as a Matter of Law.
3. Nevertheless, the Court has undertaken the weighing of evidence introduced at trial and has considered the credibility of the witnesses. Based upon the following analysis, the Court finds that the

verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice.

4. In *Persinger* v. *Peabody Coal Co.*, 196 W.Va. 707, 474 S.E.2d 887 (1996), the Supreme Court of Appeals of West Virginia held as follows: "It is axiomatic that the plaintiff's measure of damages in a cause of action in fraud would be any injury incurred as a result of the defendant's fraudulent conduct."
5. The evidence pertaining to rehabilitation costs incurred by the Plaintiff were admitted as an element of the damages incurred. That evidence was properly admitted as an element of fraud damages.
6. Further, "...'fraud in the procurement of an agreement or the obtaining of some benefit vitiates any right to receive the fruits of the contract or the benefits" '. *Thomson* v. *McGinnis*, 195 W.Va. 465, 511, 465 S.E.2d 922, 929 (1995). The doctrine of accord and satisfaction is a defense against a breach of contract claim. However, the evidence of record supports the Plaintiff's assertion of fraud in the Defendant's procurement of the oral agreement at issue. Therefore, the Defendant's assertion of accord and satisfaction under these circumstances is without merit.
7. In addition, notwithstanding the Defendant's assertion that the facts with respect to the Plaintiff's claim for rehabilitation expenses were undisputed, the record demonstrates conflicting evidence and genuine issues of fact pertaining to the amount of rehabilitation costs incurred as a result of the Defendant's fraudulent representations to the Plaintiff Based upon the evidence submitted during trial, the jury could have reasonably concluded that Radec was entitled to $89,629,89 in compensatory damages.
8. Therefore, based upon the foregoing, the Court finds that this asserted basis for a new trial is without merit.

i). Is the Defendant Entitled to a New Trial Due to the Court's Denial of the Defendant's Motion in Limine, Which Would Have Prohibited the Plaintiff From Introducing Evidence Concerning Union/ Non-Union Issues?

1. The union/non-union evidence to which the Defendant complains was presented at trial for purposes of impeaching Defendant's witnesses and corroborating the testimony of the Plaintiff's witnesses, and said evidence was admissible for those purposes.
2. Further, the union/non-union evidence was relevant to the Plaintiff's claim in accordance with Rule 403 of the West Virginia Rules of Evidence since it tended to support the Plaintiff's assertion of fraud.
3. The probative value of said evidence to the Plaintiff's claim, and for the purposes used, outweighed the prejudicial effect, if any, to the Defendant pursuant to Rule 402 of the West Virginia Rules of Evidence. If any prejudice resulted to the Defendant as a result of this evidence being admitted at trial, it was harmless.
4. Therefore, based upon the foregoing reasons, the Court finds that this asserted basis for a new trial is without merit, and the Defendant's Motion on the same is hereby DENIED.

j). Is the Defendant Entitled to a New Trial Due to the "Introduction of Testimony Pertaining to the Past Criminal Activity of Marrowbone?

1. During the Defendant's cross-examination of Richard Goff, defense counsel elicited testimony leading Mr. Goff to explain problems (more particularly including past criminal activity of the Defendant) that he had suffered with respect to the Defendant.
2. The Defendant left the door wide open, so to speak, inviting the testimony of which the Defendant complains. Yet, the Defendant failed to object or request a curative instruction to the jury.

3. There is absolutely no evidence supporting the Defendant's contention that the Plaintiff intentionally sneaked in the testimony during Defendant's crossexamination. Defense counsel asked an open-ended question and received an open answer.
4. Whatever prejudice, if any, resulted was due to the defense counsel's questioning. Further, this argument was waived by the Defendant due to its failure to object when the testimony occurred. Lastly, the prejudicial effect of said testimony, if any, was harmless and does not warrant the granting of a new trial.
5. Therefore, based upon the foregoing, the Court finds this asserted basis for a new trial without merit, and the same is DENIED.

k). Is the Defendant Entitled to a New Trial Due to the Court's Instruction to the Jury Regarding Constructive Fraud?

1). The Defendant cites a footnote from *Cordial* v. *Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248 (1996) in support of its contention that the Court's instruction on constructive fraud entitles the Defendant to a new trial.

2). The footnote cited states that constructive fraud is generally a claim asserted in actions involving either a fiduciary relationship or violation of important public policy. The case is not on point with this one, nor does it prohibit an instruction on constructive fraud in a case asserting actual tortious fraud. The Defendant cites no cases precluding an instruction on constructive fraud in similar situation.

3). The Defendant also fails to overcome the clear and convincing evidence supporting the Plaintiff's claim of actual fraud.

4). Since a general verdict was returned in favor of the Plaintiff; and the Defendant failed to request that the jury make special findings with respect to the separate liability issues, the verdict will be upheld. *See*, *Orr* v. *Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983).

C

Is the Plaintiff Entitled to an Additur Due to the Jury's Failure to Award Damages Consistent With the Unrefuted Testimony of the Plaintiff's Witnesses?

1. The Plaintiff asserts that it is entitled to an additur because the jury's compensatory award is inconsistent with the unrefuted evidence that Plaintiff introduced on the issue of damages.
2. However, the Court finds that an additur award is only appropriate where the record clearly shows that the jury's award of damages was based upon some error in calculation. See, *Bressler* v. *Mull's Grocery Mart*, 194 W.Va. 618, 461 S.E.2d 124 (1995). Otherwise, a jury's award will not be disturbed since it is within the jury's province to assess appropriate damages in accordance with whatever weight it gives to testimony concerning damages. *Id.* at 128.
3. The Court finds no evidence that the jury's award was based upon a calculation error as opposed to being assessed in accordance with the weight it gave to the Plaintiff's witnesses concerning damages.
4. Therefore, based upon the foregoing, the Court finds that the basis asserted by the Plaintiff in support of its motion for an additur is without merit and the same is DENIED.

Decision

WHEREFORE, based on the foregoing, this Court hereby ORDERS, ADJUDGES and DECREES that the Defendant's Motion for Judgment as a Matter of Law, and/or for a New Trial and/or for a Remittitur is hereby DENIED. Further, the Plaintiff's Motion for an Additur is hereby DENIED. The Clerk shall provide copies of this Order to all counsel of record.

ENTERED this 12th day of October, 1999.

/s/ Michael Thornsbury
Michael Thornsbury

ORDER—January 24, 2001

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January 2001, the following order was made and entered:

Radec, Inc., a West Virginia
corporation, Plaintiff Below,
Appellee

vs.) No. 27804

Mountaineer Coal Development Company,
d/b/a Marrowbone Development Company,
a West Virginia corporation, Defendant
Below, Appellant

The Court, having maturely considered the petition for rehearing filed in the above-captioned proceeding by the appellant, Mountaineer Coal Development Company, d/b/a Marrowbone Development Company, a West Virginia corporation, by Huddleston, Bolen, Beatty, Porter & Copen, and Richard J. Bolen, its attorneys, doth hereby refuse said petition for rehearing.

A True Copy

Attest: /s/ [illegible]
Clerk, Supreme Court of Appeals

[EXCERPT FROM CONSTITUTION OF THE UNITED STATES, Amendment XIV, § 1

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 27804

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RADEC, INC., a West Virginia corporation,
Plaintiff Below, Appellee

versus

MOUNTAINEER COAL DEVELOPMENT COMPANY,
d/b/a Marrowbone Development Company,
a West Virginia corporation,
Defendant Below, Appellant

From the Circuit Court of Mingo County
Civil Action No. 97-C-312

BRIEF OF APPELLANT

RICHARD J. BOLEN
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN
611 Third Avenue
P.O. Box 2185
Huntington, WA 25722
(304) 529-6181
Counsel for Appellant, Mountaineer Coal Development Company, d/b/a Marrowbone Development Company, a West Virginia corporation

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I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

On July 30, 1997, Plaintiff below, Appellee, Radec, Inc. ("Radec") instituted this civil action for damages alleging breach of oral contract and fraud, in the Circuit Court of Mingo County against Defendant below, Appellant Mountaineer Coal Development Company, d/b/a Marrowbone Development Company ("Marrowbone") and two former employees of Marrowbone who were later dismissed from the action. On June 2, 1999, a Mingo County jury returned a verdict in favor of Radec and against Marrowbone in the amount of $89,629.89 in compensatory damages and $1,541,648.00 in punitive damages. (R. 1151-1153[1]) Marrowbone thereafter timely filed "Defendants' Renewed Motion for Judgment as a Matter of Law and/or for a New Trial and/or for a Remittitur" (R. 1154-1217) and also separately filed "Defendants' Motion for Review of Punitive Damage Award." (R. 1265-1271) In response, Radec filed "Plaintiff's Post-Trial Motion for the Court to Provide an Additur to the Damages Awarded Plaintiff." (R. 1296-1304) Memoranda in support of and in opposition to the respective motions were filed and oral arguments were heard by the Court. On October 12, 1999, the trial court entered its "Final Order" (R. 1311-1331) denying all post-trial motions other than Defendants' Motion for Review of Punitive Damage Award, on which the Court never specifically ruled.

Because the Court Reporter was unable to complete the preparation of the transcript of the trial and post-trial proceedings within the four-month appeal period following the entry of the trial court's "Final Order," Marrowbone filed its Motion for Extension of Time to File Appellate Petition (R. 1352-1421), pursuant to Rule 3(a) of the West Virginia Rules of Appellate Procedure, which motion was granted by the trial court by Order entered February 2,

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[1] (references to the Record on Petition are (R. and the page number) as reflected in the "Index to Record" prepared by the Circuit Clerk as the index to the Record on Petition. The Record on Appeal and the Index to the Record on Appeal had not been completed by the Circuit Clerk as of the date of the filing of this brief).

2000. (R. 1422-1427) That Order extended the four-month period for presentation of a petition for appeal in this matter until April 12, 2000.

On April 11, 2000, Marrowbone filed in this Court its Petition for Appeal. On June 9, 2000, Radec filed in this Court its Brief in Opposition to Marrowbone's Petition for Appeal. By Order entered June 21, 2000, this Court granted Marrowbone's Petition for Appeal. The envelope in which the Order of June 21, 2000 was mailed to Marrowbone's counsel was stamped by the Post Office on June 26, 2000 and received by Marrowbone's counsel on June 27, 2000, which Order required nine copies of this Brief to be filed "within thirty days of receipt" of the Order.

II.

STATEMENT OF THE FACTS OF THE CASE

Radec and related corporations owned by the Goff family have engaged in coal mining activities in West Virginia and Kentucky for over twenty years (T.Vol.2, P.142; Vol.2-A, PP.185-186).[2] In addition to numerous unrelated projects for other coal companies, Radec mined several boundaries of coal for Marrowbone, pursuant to a series of written contract mining agreements (T.Vol.2-A, PP. 189, 197). The last of the written contracts between Radec and Marrowbone was applicable to two idle mines originally opened by Marrowbone but never completed (T.Vol.2-A, PP.205, 206, 224-226). Radec renamed these mines Radec No. 4 and Radec No. 5 after it bid on and was awarded the contract to produce the remaining coal from these mines (T.Vol.2-A, PP. 205, 206).

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[2] References to the transcript of the pre-trial, trial, and post-trial proceedings are by volume and page number. In the "Index to Record" prepared by the Circuit Clerk as the index to the Record on Petition, the nine volumes of the Transcript were assigned the following page numbers: Vol.1-PP.1869-2033; Vol.1-A-PP.2034-2151; Vol.2-PP.2152-2335; Vol.2-A-PP.2336-2435; Vol.3-PP.2436-2634; Vol.4-PP.1428-1606; Vol.4-A-PP.1607-1759; Vol.5-PP.1760-1837; Vol.6-PP.1838-1868.

As it was completing the mining of Radec No. 4 and preparing to mine Radec No. 5, Radec asked Marrowbone to reimburse it for anticipated costs to be incurred in rehabilitating Radec No. 5, which by then had remained idle for a number of years (T.Vol.2, PP. 152-158; Vol.2-A, P. 252). Although the applicable written contract required Radec to bear the costs of rehabilitation (Defendant's Exhibit 20, page 5), Marrowbone, nevertheless, agreed to reimburse certain rehabilitation costs and did, in fact, reimburse all such costs which were contemporaneously invoiced to Marrowbone by Radec (T.Vol.3, PP. 79, 80). After this action was filed and long after all rehabilitation and mining of Radec No. 5 was completed, Radec claimed, for the first time, that it had incurred additional rehabilitation costs in the amount of $89,629.89, for which it had never billed Marrowbone or otherwise requested payment (T.Vol.2-A, PP. 253, 254; Vol.3, PP. 35, 88, 89). Marrowbone denied Radec's tardy rehabilitation claim, but the jury ultimately found Marrowbone liable for these additional costs and awarded Radec compensatory damages (T.Vol.5, P. 71) in the exact dollar amount it had claimed for rehabilitation expenses — $89,629.89. (See Plaintiff's Exhibit 95[3]).

Radec also sought judgment for the estimated profit it allegedly could have made in mining a separate boundary of coal called the Drautz property. According to Radec's testimony, Marrowbone promised Radec the Drautz property as compensation for Radec's anticipated losses in mining Radec No. 5 (T.Vol.2, PP. 159, 160). Radec's owners contended that they had planned to exercise the thirty (30)

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[3] Although Plaintiff's Exhibit 95 and several other trial exhibits were designated to be part of the Record on Petition. the trial exhibits were not included in the Record on Petition nor in the "Index to Record."

day cancellation provision of the written contract mining agreement applicable to Radec No. 5, and would have done so but for Marrowbone's oral promise of the Drautz property (T.Vol.2, P.160). Radec theorized that the alleged oral promise of the Drautz property constituted a binding and enforceable oral contract between Radec and Marrowbone.

As an alternate legal theory for recovering the hoped-for profit on the Drautz property, Radec contended that it had relied on the alleged promise of Drautz to its detriment, amounting to fraud. In its complaint (R. 3-7), Radec alleged that the detriment it suffered in relying on Marrowbone's alleged promise was mining Radec No. 5 "at a financial loss," but at trial no such loss was proved. Instead, Radec offered evidence seeking to prove that it would have made large profits in mining the Drautz property if Marrowbone had kept its alleged promise. All of Marrowbone's witnesses consistently denied any oral contract or promise with respect to the Drautz property (T.Vol.2, PP. 105, 132; Vol.4, PP. 43, 51, 55, 56). Apparently, the jury agreed with Marrowbone's contentions with respect to the Drautz property, since the jury awarded no compensatory damages over and above the $89,629.89 in additional rehabilitation expenses.

Over Marrowbone's objection (T.Vol.4-A, P. 145), the trial court instructed the jury as to punitive damages, but those instructions, drafted by the trial court, failed to include guidance as to the factors West Virginia jurors must consider under Syl.Pt.3 of *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). In addition to other omissions, the jury was never told that any punitive damage award would have to bear a "reasonable relationship" to actual compensatory damages. In the absence of such guidance, the jury returned a punitive damage award which was more than 17 times the compensatory damage award. In overruling the post-trial motions filed by the parties,

the trial court admitted that it had overlooked *Garnes* in instructing the jury, but concluded that the error was harmless.

Although Marrowbone, in its post-trial motion seeking review of the jury's punitive damage award, specifically reminded the trial court of the necessity of making the nine step analysis required by Syl.Pt.4 of *Garnes*, *supra*, the court's "Final Order" did not address all nine points. Among other things, the "Final Order" failed to analyze whether there was evidence in the record of "actual intention to cause harm" or "actual evil intention", Syl.Pt.15 of *TXO Production Corp.* v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff. 509 U.S. 443, 125 L.Ed.2d 366, 113 S.Ct. 2711 (1993), sufficient to justify a punitive damage award more than 17 times greater than compensatory damages.

III.

ASSIGNMENTS OF ERROR RELIED UPON AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

A. Assignments of Error Relied Upon

(1) ABSENT PROOF OF FRAUD, THE TRIAL COURT ERRED IN (A) SUBMITTING RADEC'S FRAUD THEORY TO THE JURY, AND (B) IN INSTRUCTING THE JURY AS TO PUNITIVE DAMAGES

(a) Radec failed to prove two of the essential elements of fraud

(i) No proof of misrepresentation of an existing fact

(ii) No proof of fraud damages

(b) The trial court should never have instructed the jury as to punitive damages, absent proof of fraud

(2) THE TRIAL COURT'S ADMITTED FAILURE TO PROPERLY INSTRUCT THE JURY AS TO PUNITIVE DAMAGES UNDER *GARNES* AND *TXO*, RESULTED IN A CONSTITUTIONALLY DEFECTIVE CHARGE

(3) THE TRIAL COURT ERRED (A) IN FAILING TO MAKE A "MEANINGFUL AND ADEQUATE REVIEW" OF THE JURY'S PUNITIVE DAMAGE AWARD AND (B) IN FAILING TO SET ASIDE OR REDUCE THAT AWARD

(a) The trial court's analysis of the punitive damage award was constitutionally flawed under *Garnes-TXO* and federal due process standards

(b) When properly reviewed, it is obvious that the punitive damage award was "grossly excessive" and thus constitutionally flawed

(i) The jury's punitive damage award didn't bear a reasonable relationship to any harm actually sustained by Radec or likely to be sustained

(ii) The reprehensibility of Marrowbone's conduct was slight at best

(iii) Marrowbone's only "profit" in deferring the payment of $89,629.89 would have been the interest it could have earned on that sum — a tiny fraction of the $1,541,648.00 punitive damage award

(iv) The punitive damages awarded by the jury did not bear a reasonable relationship to the compensatory damages

(v) The financial position of Marrowbone was never taken into account

(vi) There was no evidence presented to the jury, or to the trial court, with respect to the costs of the litigation

(vii) There were no criminal sanctions imposed on Marrowbone, but the trial court never became aware of that

(viii) There are and have been no other civil actions against Marrowbone based on the alleged promises to Radec, but the trial court never became aware of that

(ix) Contrary to the recitals of the trial court in its "Final Order," reasonable attempts were made to settle this action prior to trial and the trial court was aware of those efforts

(4) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO RADEC'S ORAL CONTRACT THEORY IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE OF THE EXISTENCE OF AN ORAL CONTRACT

(5) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO CONSTRUCTIVE FRAUD, WHICH NECESSARILY PREJUDICED MARROWBONE

(6) THE TRIAL COURT ERRED IN OVERRULING MARROWBONE'S OBJECTION TO DOCUMENTS SHOWING GROSS INCOME OR GROSS REVENUES OF MARROWBONE

(7) THE TRIAL COURT ERRED IN FAILING TO GRANT MARROWBONE'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO RADEC'S CLAIM FOR REHABILITATION EXPENSES, WHICH CLAIM WAS BARRED BY THE DOCTRINE OF ACCORD AND SATISFACTION

(8) THE TRIAL COURT ERRED IN FAILING TO GRANT MARROWBONE'S MOTION IN LIMINE TO PROHIBIT RADEC FROM INTRODUCING EVIDENCE AS TO UNION/NON-UNION ISSUES WHICH WERE IRRELEVANT AND PREJUDICIAL TO MARROWBONE

B. Manner in Which Assignments of Error were Decided in the Lower Tribunal

The trial court overruled all post-trial motions, other than Defendant's Motion for Review of Punitive Damage Award, on which the court never specifically ruled.

IV.

POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF LAW, AND RELIEF PRAYED FOR

A. Points and Authorities Relied Upon.

(1) ABSENT PROOF OF FRAUD, THE TRIAL COURT ERRED IN (A) SUBMITTING RADEC'S FRAUD THEORY TO THE JURY, AND (B) IN INSTRUCTING THE JURY AS TO PUNITIVE DAMAGES.

(a) Radec failed to prove two of the essential elements of fraud.

Croston v. *Emax Oil Co., a Virginia corp.*, 195 W.Va. 86, 464 S.E.2d 728, 732 (1995);

Janssen v. *Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1953) Syl.Pt.4.;

Bowling v. *Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144, 148 (1992)(Syl.Pt.2);

(b) The trial court should never have instructed the jury as to punitive damages, absent proof of fraud.

Alkire v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) Syl.Pt.7;

Mayer v. *Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895);

Haynes v. *Rhone-Poulenc, Inc.*, 206 W.Va. 18, 521 S.E.2d 331, 348 (1999);

Shrewsberry v. *Aztec Sales & Service Co.*, 191 W.Va. 312, 445 S.E.2d 253 (1994);

Stafford v. *Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210 (1996);

Hayseeds, Inc. v. *State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73, 80 (1986);

(2) THE TRIAL COURT'S ADMITTED FAILURE TO PROPERLY INSTRUCT THE JURY AS TO PUNITIVE DAMAGES UNDER *GARNES* AND *TXO*, RESULTED IN A CONSTITUTIONALLY DEFECTIVE CHARGE.

Garnes v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) (Syl.Pt.3)(Syl.Pt.3(4));

State v. *Allen*, ___ W.Va. ___, ___ S.E.2d ___, 1999 W.Va. Lexis 134 (1999);

Pacific Mutual Life Ins. Co. v. *Haslip*, 429 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); 499 U.S. at 18, 111 St.Ct. at 1043;

TXO Production Corp. v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff. 509 U.S. 443, 125 L.Ed.2d 366, 113 S.Ct. 2711 (1993)(Syl.Pt.15);

BMW of North America, Inc. v. *Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 1601, 134 L.Ed.2d 809 (1996);

(3) THE TRIAL COURT ERRED (A) IN FAILING TO MAKE A "MEANINGFUL AND ADEQUATE REVIEW" OF THE JURY'S PUNITIVE DAMAGE AWARD AND (B) IN FAILING TO SET ASIDE OR REDUCE THAT AWARD.

(a) The trial court's analysis of the punitive damage award was constitutionally flawed under *Garnes-TXO* and federal due process standards.

Garnes v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991)(Syl.Pts. 3 and 4)(Syl.Pt.5);

Alkire v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122, 130 (1996);

TXO Production Corp. v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993)(Syl.Pt.15);

(b) When properly reviewed, it is obvious that the punitive damage award was "grossly excessive" and thus constitutionally flawed.

Mayer v. *Frobe*, 40 W.Va. 246, 22 S.E.58 (1895);

Alkire v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122, 125 (1996)(Syl.Pt.7);

BMW of North America, Inc. v. *Gore*, 517 U.S. 559, 562, 576, 116 S.Ct. 1589, 1592 1602, 134 L.Ed.2d 809 (1996);

TXO Production Corp. v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993);

Vandevender v. *Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678, 691 (1997), U.S. *cert denied*, 139 L.E.2d 871;

Earl T. Browder, Inc. v. *County Court of Webster County*, 145 W.Va. 696, 116 S.E.2d 867, 872 (1960);

Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1, 23, 24, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991);

(4) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO RADEC'S ORAL CONTRACT THEORY IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE OF THE EXISTENCE OF AN ORAL CONTRACT.

Thompson v. *Stuckey*, 171 W.Va. 483, 300 S.E.2d 295, 299 (1983);

Sayres v. *Bauman*, 188 W.Va. 550, 425 S.E.2d 226 (1992);

Phillips v. *Consolidation Coal Company*, 153 F.3d 721 (unpublished opinion) (4th Cir.1998);

W.Va. Code §55-1-1;

(5) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO CONSTRUCTIVE FRAUD, WHICH NECESSARILY PREJUDICED MARROWBONE.

Stanley v. *Sewell Coal Co.*, 169 W.Va. 72, 285 S.E.2d 679, 683 (1982);

Cordial v. *Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248, 259, 260 (1996);

Wilt v. *State Auto Mut. Ins. Co.*, 203 W.Va. 165, 506 S.E.2d 608, 612 (1998);

State v. *Wayne*, 162 W.Va. 41, 245 S.E.2d 838 (1978) overruled on other grounds, *State* v. *Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983);

State v. *Belcher*, 161 W.Va. 660, 245 S.E.2d 161 (1978);

Wheeler v. *Murphy*, 192 W.Va. 325, 452 S.E.2d 416, 427 (1994);

(6) THE TRIAL COURT ERRED IN OVERRULING MARROWBONE'S OBJECTION TO DOCUMENTS SHOWING GROSS INCOME OR GROSS REVENUES OF MARROWBONE.

Roberts v. *Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 799 (1986);

Stafford v. *Rocky Hollow Coal Company*, 198 W.Va. 593,. 482 S.E.2d 210, 217 (1996);

(7) THE TRIAL COURT ERRED IN FAILING TO GRANT MARROWBONE'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO RADEC'S CLAIM FOR REHABILITATION EXPENSES, WHICH CLAIM WAS BARRED BY THE DOCTRINE OF ACCORD AND SATISFACTION.

Painter v. *Peavy*, 192 W.Va. 189, 451 S.E.2d 755, 759 (1994);

Summers v. *Summers*, 186 W.Va. 635, 413 S.E.2d 692, 698 (1991);

Garnes v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991);

(8) THE TRIAL COURT ERRED IN FAILING TO GRANT MARROWBONE'S MOTION IN LIMINE TO PROHIBIT RADEC FROM INTRODUCING EVIDENCE AS TO UNION/NON-UNION ISSUES WHICH WERE IRRELEVANT AND PREJUDICIAL TO MARROWBONE.

Stafford v. *Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210, 217 (1996);

W.Va.R.Evid. 402

W.Va.R.Evid. 403

B. Discussion of the Law

(1) ABSENT PROOF OF FRAUD, THE TRIAL COURT ERRED IN (A) SUBMITTING RADEC'S FRAUD THEORY TO THE JURY, AND (B) IN INSTRUCTING THE JURY AS TO PUNITIVE DAMAGES.

(a) Radec failed to prove two of the essential elements of fraud.

(i) No proof of misrepresentation of an existing fact.

What Radec characterized as "fraud" in its complaint and at trial doesn't constitute fraud under West Virginia law, because the "misrepresentation" relied on was not a misrepresentation of an *existing* fact. The act alleged in the complaint to constitute fraud was Marrowbone's supposed promise to allow Radec to mine the Drautz property (see para. 5 of the complaint; R. 3-7). This "promise and agreement" was allegedly made with the intention of falsely inducing Radec to mine Radec No. 5, supposedly an unprofitable tract of coal (para. 6 of the complaint). Radec, according to the complaint, reasonably relied upon these "representations" of Marrowbone and did, in fact, mine Radec No. 5 at a financial loss (para. 8 of the complaint).

Consistent with the allegations of the complaint, Radec's counsel, in his opening statement, summarized Radec's fraud theory this way:

> "The fraud in this case deals with Radec being induced to continue to mine Mine Number 5, incurring substantial costs on the promise they were going to get this Drautz property to mine which had about 2.2 million tons of clean coal that could be mined on it. So that's the fraud – Radec being induced, being put in that situation." (T.Vol.1, P. 86).[4]

Radec's evidence at trial was all to the same effect — Radec supposedly relied to its detriment on Marrowbone's alleged promise of Drautz. None of this, however, adds up to fraud, because:

> "Fraud cannot be predicated on a promise not performed. To make it available, there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or his property."

Syllabus Pt. 3, *Croston* v. *Emax Oil Co., a Virginia corp.*, 195 W.Va. 86, 464 S.E.2d 728 (1995) (emphasis in the original). To the same effect, *see*, *Janssen* v. *Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952) Syl.Pt.4. The promise allegedly made by Marrowbone, i.e., that Marrowbone would hire Radec to mine the Drautz property is clearly promissory in nature and does not involve a false assertion in regard to any *existing* fact.

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[4] Radec's counsel told the jury virtually the same thing in closing:

> "The fraud in this case is very simple as well. Was Radec induced into continuing to mine Number 5 Mine based upon the promise that it was going to mine the Drautz property?" (T.Vol.5, P. 6).

In the case at bar, there was no evidence introduced to the effect that Marrowbone did not intend to let Radec mine the Drautz property at the time the alleged promise was made.[5] Absent "clear and convincing"[6] evidence that Marrowbone did not intend to perform the alleged promise at the time it was made,[7] there was no misrepresentation of an *existing* fact and thus no proof of fraud.

(ii) No proof of fraud damages.

There was also no proof of damages resulting from the alleged fraud, which is one of the essential elements of fraud under West Virginia law. *See*, *Bowling* v. *Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992)(Syl.Pt.2). Although Radec alleged in its complaint that it had mined Radec No. 5 at a financial loss, in reliance on the promise of Drautz, Radec offered no evidence at trial of any financial loss in Radec No. 5. Radec's bookkeeper admitted that she didn't know how much money Radec made or lost in any of its mines (T.Vol.3, P. 57), including Radec No. 5:

> "Q. And you don't know how much money Radec lost in Radec Number 5 either, do you?

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[5] To the contrary, Radec's counsel, as discussed below, admitted in closing argument that Marrowbone "may have had good intentions" (T.Vol.5, P. 7).

[6] It is well settled, of course, that fraud must be proved by "clear and convincing" evidence. *See*, e.g., *Bowling* v. *Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144, 148 (1992).

[7] See, *Croston*, *supra*:

> "Ordinarily, as previously stated, such an expression of intention or opinion will not serve as the predicate of fraud unless the party claiming fraud shows the nonexistence of the intention to fulfill the promise or predicted act at the time the promise or predicted act was made." 464 S.E.2d at 732.

A. Not without a financial statement; I know rehabilitation costs, but I don't know the exact total cost." (T.Vol.3, P. 59).

No other witness, including Radec's accounting expert, opined as to a loss in Radec No. 5. Radec's accounting expert admittedly had done no work with respect to the tax years in which Radec No. 5 was mined (T.Vol.3, P. 156). His opinions related solely to the tax year which ended June 30, 1994 (before the mining of Radec No. 5). He used the profits Radec admittedly made that year mining Radec No. 4 as the basis for projecting the profits Radec thinks it would have made if it had been permitted to mine the Drautz property — all totally unrelated to Radec No. 5.

When Marrowbone's counsel pointed out, in arguing Marrowbone's motion for judgment as a matter of law at the close of Radec's case, that there had been no proof of a loss in Radec 5 and, therefore, no proof of fraud damages (T.Vol.4, PP. 1, 2), Radec's counsel did not contest the fact that there was no evidence of a loss in Radec No. 5, but instead argued that the additional rehabilitation costs Radec had sustained in the amount of $89,629.89, constituted fraud damages (T.Vol.4, P. 6). This argument was not, however, consistent with the evidence, in at least two respects.

To begin with, Radec's chief witness, Dick Goff, testified that the promise of Drautz was first made in "early summer" 1995 (T.Vol.2-A, P. 200), i.e., sometime after June 20, 1995, whereas the rehab efforts for which Radec sought reimbursement commenced in April of 1995 (Plaintiff's Exhibit 95). Obviously, those rehab costs couldn't possibly have been incurred in reliance on a promise not yet made.

Secondly, it was undisputed that the rehab expenses were incurred, not in reliance on the alleged promise of Drautz, but rather on an *entirely separate* oral promise by

Marrowbone, unrelated to the alleged promise of the Drautz property, to pay these rehabilitation costs. All of the witnesses who testified at the trial agreed that there was a promise made by Marrowbone, unrelated to Drautz, to pay at least some of the rehab costs.[8] Not only were all witnesses in agreement that a separate promise was made, all agreed that Marrowbone honored its promise to pay those rehab costs — to the extent that the costs were actually invoiced to Marrowbone. Since it is undisputed that the additional rehab costs were incurred in reliance on a promise which was honored, a promise never even alleged to have been fraudulent, those costs and the damage award for those costs do not constitute fraud damages. Absent proof of damages incurred in reliance on a misrepresentation of an existing fact there can be no recovery for fraud. See Syl.Pt.2 of *Bowling* v. *Ansted Chrysler-Plymouth-Dodge*, *supra* and Michies Jurisprudence, Fraud and Deceit, Section 28:

> "It is an ancient rule of the common law that in order for a party to be entitled to a right of action for fraud, it is necessary for it to be coupled with damage."

(b) The trial court should never have instructed the jury as to punitive damages, absent proof of fraud.

As set forth in Syllabus Point 7 of *Alkire* v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996), the West Virginia punitive damage jurisprudence includes a two-step paradigm, the first of which is to determine whether the conduct of the defendant toward the plaintiff

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[8] See, e.g., testimony of Radec's chief witness Dick Goff:

> "Like I said, the mines had really deteriorated really bad. It was even worse than Marrowbone had anticipated and I finally got their experts and engineers in to look at it and they agreed and the longer I was in there the more money it was costing me, and Mr. Epperly – he agreed to pay for the cost of rehabbing the mine." (T.Vol.2, P. 158).

entitles the plaintiff to a punitive damage award at all under *Mayer* v. *Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895). In Syllabus Point 4 of *Mayer*, this Court stated:

> "In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where the legislature enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous."

In *Alkire*, *supra*, this court noted that "... we are still committed to the traditional rule announced in *Mayer* and cited with approval in a number of subsequent cases." 475 S.E.2d 122, 129. *See*, also, *Haynes* v. *Rhone-Poulenc, Inc.*, 206 W.Va. 18, 521 S.E.2d 331, 348 (1999). In keeping with *Alkire*, this Court in recent years has, on more than one occasion, approved trial court refusals to give punitive damage instructions where the conduct of the defendant did not constitute "gross fraud." *See*, e.g., *Shrewsberry* v. *Aztec Sales & Service Co.*, 191 W.Va. 312, 445 S.E.2d 253 (1994) and *Stafford* v. *Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210 (1996).

In the case at bar, there simply was no showing of "gross" fraud or, in fact, any fraud at all for the reasons discussed above. There was testimony as to an alleged promise of a future contract, but there was no testimony or evidence of a misrepresentation of any *existing* fact, and no proof of fraud damages. Therefore, there was no fraud and certainly no "gross fraud."

Absent plaintiff's claim for fraud, this action was one for breach of contract only, and in such actions punitive damages are, of course, not available. *See*, e.g., *Hayseeds, Inc.* v. *State Farm*, 177 W.Va. 323, 352 S.E.2d 73, 80 (1986).

(2) THE TRIAL COURT'S ADMITTED FAILURE TO PROPERLY INSTRUCT THE JURY AS TO PUNITIVE DAMAGES UNDER *GARNES* AND *TXO*, RESULTED IN A CONSTITUTIONALLY DEFECTIVE CHARGE.

In its "Final Order" the trial court candidly admitted that it failed to give the punitive damage instructions required by *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) (Syl.Pt.3), but attempted to justify that omission by arguing that it was not "plain error" and didn't lead to an "outrageous result".[9] Both of these conclusions are wrong, however.

First, the omission of the *Garnes-TXO* instructions resulted in a constitutionally defective charge (discussed below), and constitutional deficiencies are ordinarily treated as "plain error":

> "'Alleged errors of a constitutional magnitude will generally trigger a review by this court under the plain error doctrine.' *State* v. *Salmons*, 203 W.Va. at 571 N.13, 509 S.E.2d at 852 n.13."

State v. *Allen*, ___ W.Va. ___, ___ S.E.2d ___, 1999 W.Va. Lexis 134 (1999).

Second, a $1.5 million punitive damage award 17 times greater than the compensatory damages in a case with no "actual evil intention" or other aggravating factors (discussed below) clearly is an "outrageous result", and the omission of the *Garnes* instructions arguably accounts for that lopsided award. Particularly troubling was the trial court's failure to alert the jury to the requirement that "as

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[9] "The court agrees with defendant that the *Garnes* instruction should have been given to the jury in this case. However, the court finds that the failure of giving the instruction did not lead to plain error with an outrageous result." (Trial Court's "Final Order").

a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages", *Garnes*, Syl.Pt.3(4). Without guidance on this point, the jury was left to arbitrarily select an amount for punitive damages, without regard to the amount of compensatory damages, and without even knowing that there was supposed to be a balance — a reasonable relationship — between the two.

Garnes, supra was West Virginia's response to the U.S. Supreme Court's decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 429 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) which established due process standards for punitive damage awards. One of the due process standards approved in *Pacific Mutual* and adopted in *Garnes* was the requirement that the jury be instructed as to the requirement of "reasonable relationship" between compensatory and punitive damages.[10] This requirement was later quantified in Syllabus Point 15 of *TXO Production Corp.* v. *Alliance Resources Corp*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff. 509 U.S. 443, 125 L.Ed.2d 366, 113 S.Ct. 2711 (1993), holding that punitive damage awards should never exceed a 5 to 1 ratio to compensatory damages, absent "actual evil intention."

Although the U.S. Supreme Court has held that there is no "mathematical bright line" as to constitutionality, "adequate guidance" to the jury, through instructions, is

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[10] *See*, also, *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 1601, 134 L.Ed.2d 809 (1996):

> "The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree.... Our decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant."

part of the "constitutional calculus." *Pacific Mutual*, 499 U.S. at 18, 111 S.Ct. at 1043. That part of the "constitutional calculus" was missing from the trial court's instructions in the case at bar, which did not include any of the *Garnes* factors (T.Vol.4-A, PP. 164, 165, 171, 172). As a result, the jury was effectively given unlimited discretion in fixing punitive damages. Such unlimited discretion, the U.S. Supreme Court has held, "may invite extreme results." *Pacific Mutual*, 499 U.S. at 18, 111 S.Ct. at 1043. The "extreme result" in the case at bar – a 17 to 1 punitive damage award – should be set aside as constitutionally defective.

(3) THE TRIAL COURT ERRED (A) IN FAILING TO MAKE A "MEANINGFUL AND ADEQUATE REVIEW" OF THE JURY'S PUNITIVE DAMAGE AWARD AND (B) IN FAILING TO SET ASIDE OR REDUCE THAT AWARD.

(a) The trial court's analysis of the punitive damage award was constitutionally flawed under *Garnes-TXO* and federal due process standards.

Following the trial, Marrowbone filed "Defendants' Renewed Motion for Judgment as a Matter of Law and/or for a New Trial and/or for a Remittitur" (R. 1154-1217) and also separately filed "Defendants' Motion for Review of Punitive Damage Award," together with memorandum in support thereof. (R. 1265-1271) In that memorandum and again at the oral argument on the post-trial motions (T.Vol.6, PP. 27,28), the trial court was reminded that *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) and its progeny have made it "imperative", *Alkire* v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122, 130 (1996), that trial courts make a "meaningful and adequate review" of each punitive damage award, applying the model first announced in Syllabus Points 3 and 4 of *Garnes*, and Syllabus Point 15 of *TXO Production Corp.* v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870

(1992), aff'd, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).[11]

Notwithstanding the fact that the court was thus fully apprised of the applicable law, and the "imperative" requirement for a "meaningful and adequate review", it appears that no such review was conducted.[12] In its "Final Order" (R. 1311-1331) overruling all post-trial motions other than Defendant's Motion for Review of Punitive Damage Award, the trial court quoted in full the nine (9) *Garnes* factors (Syl.Pts.3 and 4 of *Garnes*) (thus acknowledging the court's awareness of the controlling law) and then offered these comments on the jury's punitive damage award:

> "In summary, the Court finds that the evidence supports the Plaintiff's position that the harm likely to occur, in addition to the harm actually incurred as a result of the Defendant's conduct would be grievous. Further, the evidence of record indicates that the Defendant failed to make reasonable efforts to correct

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[11] "Meaningful and adequate review" is a federal due process concept. In *Pacific Mutual*, *supra*, the U.S. Supreme Court approved Alabama's procedure for post-trial review, noting that it "... ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." 499 U.S. at 20, 111 S.Ct. at 1044.

[12] In fact, the trial court never even ruled on Defendant's Motion for Review of Punitive Damage Award and never allowed the parties an opportunity to present additional facts relevant to the last four *Garnes* factors, such as whether any criminal sanctions had ever been imposed on the defendant, whether there had been any other civil actions against the defendant based on the same conduct, the costs of the litigation, or the extent of settlement efforts. At the oral argument on the post-trial motions, the trial court simply passed over Defendant's Motion for Review of Punitive Damage Award without comment, although the issue was specifically raised at that time by Marrowbone's counsel (T.Vol.6, PP. 27, 28).

> the damage done or make amends to the Plaintiff when liability should have become clear. The evidence also supports the Plaintiff's assertion that the Defendant profited from its wrongdoing and that the punitive damage award properly appears to remove that profit. Moreover, under the circumstances of this case, the Court finds that the punitive damages award bear a reasonable relationship to the compensatory award. The award is not unreasonable or monstrous given what's known from the record about the Defendant's financial position. And, lastly, none of the factors which would work to mitigate a punitive damages award, such as prior criminal sanctions, or other similar civil actions, and reasonable attempts at settlement appear present in this case."

Far from being a "meaningful and adequate review", these skeletal conclusions by the trial court were inadequate in several respects. To begin with, the court failed to address *TXO* Syllabus Point 15 at all, i.e., no consideration was given to whether the punitive damage award in this action should have been limited to a 5 to 1 ratio vs. compensatory damages, or whether, on the other hand, there was evidence from which a jury could reasonably have found "actual evil intention" sufficient to justify a higher ratio.

Further, the trial court failed to support its conclusions with *any* citation to any facts or evidence with respect to the nine *Garnes* factors. As this Court held in Syllabus Point 5 of *Garnes*, the post-trial review required of punitive damage awards is based on "the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage," and:

> "When reviewing the punitive damages award, a West Virginia trial court should thoroughly set out the reasons for changing (or not changing) the award." 413 S.E.2d 897, 910.

In the case at bar, the trial court's "analysis" fails to "thoroughly set out the reasons" for the court's conclusions. In lieu of citing either evidence or reasons, the trial court simply recited general and unsupported conclusions which can't be reviewed on appeal. It simply is impossible to ascertain what facts, evidence or reasons the trial court may or may not have had in mind in reaching what appears to be a rubber-stamp approval of the jury's 17 to 1 punitive damage award.

Finally, the court's "analysis" failed to address all of the nine *Garnes* elements, even in a conclusory manner. For example, the trial court makes no reference to how long the defendant continued in its actions, whether the defendant was aware its actions were causing or likely to cause harm, whether or how long the defendant engaged in similar conduct in the past, or what the costs of the litigation were. See Syllabus Point 4 of *Garnes*.

(b) When properly reviewed, it is obvious that the punitive damage award was "grossly excessive" and thus constitutionally flawed.

The first step in a "meaningful and adequate" post-trial review of a punitive damage award is to determine whether the conduct of the defendant toward the plaintiff entitles the plaintiff to a punitive damage award at all under *Mayer* v. *Frobe*, 40 W.Va. 246, 22 S.E.58 (1895). Only if that question is answered in the affirmative does the court move on to a consideration of the nine *Garnes* factors and *TXO* Syllabus Point 15. *See*, Syllabus Point 7 to *Alkire* v. *First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122, 125.

As discussed above, punitive damage instructions were not warranted at all in this action, absent clear and convincing evidence of fraud or other intentional wrongdoing. Even if such instructions had been warranted, it is apparent from the evidence that the $1,541,648.00 punitive dam-

age award returned by the jury was "grossly excessive" under the *Garnes* and *TXO* factors and under federal due process requirements.[13] The *Garnes-TXO* factors and the evidence relevant to each are as follows:

(i) The jury's punitive damage award didn't bear a reasonable relationship to any harm actually sustained by Radec or likely to be sustained.

The sole and only basis for instructing the jury on punitive damages was Radec's allegation of fraud. As discussed above, Radec failed to prove the essential elements of fraud, and, therefore, was not entitled to a punitive damage instruction at all. Even if fraud had been properly proved, the only damages even arguably resulting therefrom were the additional expenses, in the amount of $89,629.89, incurred by Radec in rehabilitating Radec No. 5. It was never proved or even alleged that any misrepresentations by Marrowbone were part of an ongoing pattern or practice of behavior by Marrowbone or were likely to cause any further or additional damages in the future. At best, the sum total of "harm" caused by the alleged fraud was $89,629.89, and the punitive damage award in the amount of $1,541,648.00 clearly does not bear any reasonable relationship to that actual harm. In the trial court's brief commentary on the *Garnes* factors (quoted above), the court found that:

> "... the harm likely to occur, in addition to the harm actually incurred as a result of the Defendant's conduct would be grievous."

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[13] If a punitive damage award is "grossly excessive", it is unconstitutional under the Fourteenth Amendment to the U.S. Constitution. *See, BMW of North America, Inc., supra*, 517 U.S. at 562, 116 S.Ct. at 1592:

> "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tort feasor."

Just what "grievous harm" the court was able to foresee as "likely to occur" is unknown – and unsupported by any evidence in the record. Here again, without references to specific evidence, it is impossible to review the trial court's conclusions.

(ii) The reprehensibility of Marrowbone's conduct was slight at best.

Under the second *Garnes* factor, the jury in awarding punitive damages and the trial court in reviewing such award may consider the reprehensibility of the defendant's conduct, and in so doing:

> "... should take into account how long the defendant continued in his actions, whether he was aware his actions were causing harm or were likely to cause harm, whether he attempted to conceal or coverup his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him."

Garnes, *supra*, Syl.Pt.3(2).

As discussed above, the jury in the case at bar was never instructed to take any of these factors into account in determining whether to award punitive damages, nor did the trial court refer to any of these matters in approving the punitive damage award.

According to Radec's witnesses, they met with Marrowbone officials on two occasions (T.Vol. 2-A, P. 234) and were promised the Drautz property and told that Radec was included in Marrowbone's five year plan to provide coal, all of which was categorically denied by Marrowbone's witnesses. Beyond these promises and/or vague assurances allegedly made on a couple of occasions, there was no evidence that Marrowbone engaged in any prolonged

pattern of misrepresentations to Radec. Likewise, Radec offered no evidence to the effect that Marrowbone or its officials were aware that the alleged misrepresentations were causing or likely to cause harm to Radec.

Arguably, the most important factor in determining reprehensibility is the defendant's state of mind, and as discussed below, Radec's counsel admitted in his closing argument that Marrowbone "may have had good intentions." (T.Vol.5, P. 7). Certainly, there was no evidence of "actual evil intention." *TXO*, Syl.Pt.15.

Also, there was no evidence from any witness to the effect that any Marrowbone official or employee attempted to conceal or cover up any of the alleged misrepresentations. Radec's attorneys reviewed hundreds of Marrowbone documents (T.Vol.1, PP. 44, 45), took numerous depositions and never developed or presented to the jury any shred of evidence of any attempted cover-up.

With regard to whether Marrowbone made reasonable efforts to make amends by offering a fair and prompt settlement once liability became clear, it was and is Marrowbone's position (supported by the testimony of numerous witnesses) that it, in fact, never made the alleged promise of the Drautz property. Thus, there was nothing to make amends for. Liability did not become clear to Marrowbone until the jury returned its verdict. In that regard, Radec admitted that it had never, at any time prior to this action, put Marrowbone on notice that Radec believed it was entitled to the additional $89,869.89 in rehabilitation costs awarded by the jury (T.Vol.2-A, PP. 253, 254). According to the undisputed evidence, Radec billed Marrowbone periodically for its rehabilitation costs, and each and every one of those bills was paid in full (T.Vol.3, PP. 79, 80). According to Radec's witnesses, the additional $89,869.89 awarded by the jury was not even calculated by Radec until after this

action was filed. Then, and only then, did Radec — at the request of Radec's counsel — recompute its rehabilitation expenses, adding in some items that it had previously decided to exclude from the contemporaneous bills which were sent to Marrowbone (T.Vol.3, PP. 88, 89) and paid in full by Marrowbone. Thus, Marrowbone never knew that Radec was even claiming an additional $89,629.89.00 until long after this action was filed. Given these facts, there is simply no way Marrowbone can be faulted for failing to "make amends", and the trial court's conclusions to the contrary are not based on any evidence in the record.

It's important to note that Radec, as a corporate plaintiff, did not allege any physical or mental injury or non-economic loss of any kind. Consistent with the claims made, the jury's compensatory damage award was strictly limited to economic losses. The U.S. Supreme Court has noted that "purely economic" harm, such as that alleged in the case at bar, is often not sufficiently reprehensible to warrant significant punitive damages. *See*, *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 576, 116 S.Ct. 1589, 1602, 134 L.Ed.2d 809 (1996):

"In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature."

(iii) Marrowbone's only "profit" in deferring the payment of $89,629.89 would have been the interest it could have earned on that sum — a tiny fraction of the $1,541,648.00 punitive damage award.

Although no evidence was introduced to the effect that Marrowbone profited from its failure to reimburse Radec for the alleged additional $89,629.89 in rehabilitation costs, it could be argued that by deferring the payment of that amount, Marrowbone correspondingly "profited" to the ex-

tent of the value of the use of that money.[14] Thus, a punitive damage award in an amount equal to interest on $89,629.89 would have fully removed all "profit" which Marrowbone might even arguably have made as a result of deferring the payment of the $89,629.89. Of course, if a punitive damage award in that amount would have been adequate under the third *Garnes* factor to remove all profit, then, obviously, the actual punitive damage award in the amount of $1,541,648.00 was "grossly excessive."

Further, the trial court's comment in its "Final Order" (R. 1311-1333) that "... the Defendant profited from its wrongdoing and that the punitive damage award properly appears to remove that profit" fails to address the extent of Marrowbone's profitability, if any, and fails to draw any comparison between the size of the "profit" and the size of the punitive damage award. The issue in this case is not whether a $1.5 million punitive damage award was adequate to remove any "profit" Marrowbone may have earned by holding on to $89,629.89 — there's no doubt about that. The issue is whether the punitive damage award was far more than adequate, i.e., "grossly excessive" when compared with the tiny amount of Marrowbone's "profitability" on deferring payment of $89,629.89.

(iv) The punitive damages awarded by the jury did not bear a reasonable relationship to the compensatory damages.

Syllabus Point 15 of *TXO Production Corp.* v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) states:

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[14] Of course, this argument entirely ignores the undisputed fact that Marrowbone was never made aware of Radec's claim for additional rehabilitation costs until long after this action was filed. Thus, the delay in payment was necessarily Radec's fault, not Marrowbone's.

> "The outer limit of ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional."

There was absolutely no evidence offered at trial in the case at bar to the effect that Marrowbone "actually intended to cause harm" to Radec. Under Radec's theory of the case, Marrowbone officials told Radec that they would give Radec a more profitable property to mine, the Drautz property, to compensate Radec for the losses it projected it would incur in mining Radec No. 5. Even assuming Radec's allegations are absolutely true, there was no evidence or testimony from which a jury could have concluded that the alleged promise was made in order to "cause harm" to Radec. At best, the promise was made, according to Radec, to encourage Radec to complete the mining of the Radec No. 5 Mine – something Radec had already agreed in writing (Defendant's Exhibit 20) that it would do. That, of course, is a far cry from an "actual evil intention" to cause harm.

None of Radec's witnesses ever testified, or even suggested, that Marrowbone was acting with "evil intention" or somehow wanted to harm or hurt Radec. Importantly, in his closing argument, Radec's counsel conceded that the alleged promissor, Marrowbone's Howard Epperly, "may have had good intentions":

> "The fraud in this case doesn't necessarily depend on whether Marrowbone or Mr. Epperly or Mr. Jones had good intentions to do what they did. What is important in this case and what is essential for plaintiff to prove was simply for you to find fraud is what was said to Radec about mining the Drautz property in

> exchange for continuing to mine Radec Number 5 if that is untrue and it relied upon by Radec, *even though Mr. Epperly may have had good intentions*, then we have proven fraud. It's the reliance on the plaintiff that counts, not the intentions of the person making the statement." (emphasis added). (T.Vol.5, P. 7).

There was no testimony as to any plot, plan or intention on Marrowbone's part to get even for past wrongs – real or perceived, and no evidence of any personal animosity or bad feelings on the part of any Marrowbone officials toward Radec. Absent any evidence of "actual intention to cause harm," "actual evil intention," the outer limit of the ratio of punitive damages to compensatory damages in the case at bar should have been 5 to 1 under *TXO* Syl.Pt.15.[15] Thus, the court erred in failing to grant a remittitur of the punitive damage award from $1,541,648.00 to $448,149.45 (5 times $89,629.89).[16] As discussed above, the trial court not only failed to grant a remittitur, it apparently failed to even consider the requirements of *TXO* Syl.Pt.15 and certainly never offered any evidentiary justification for its decision to approve a punitive damage award which was more than 17 times compensatory damages.

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[15] *See*, also, *Vandevender* v. *Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678, 691 (1997), U.S. *cert denied*, 139 L.E.2d 871:

> "Only in those cases where the defendant can be shown to have actually intended to cause harm is the ratio of punitives to compensatories permitted to climb higher (than 5 to 1) without 'rais[ing] a suspicious judicial eyebrow.' *TXO*, 509 U.S. at 481, 113 S.Ct. at 2732 (O'Conner, J. dissenting."

[16] Remittitur is particularly appropriate "where the amount of the excess is definitely ascertainable." *Earl T. Browder, Inc.* v. *County Court of Webster County*, 145 W.Va. 696, 116 S.E.2d 867, 872 (1960).

(v) The financial position of Marrowbone was never taken into account.

No evidence was presented to the jury with respect to the profitability of Marrowbone, its net asset value, or any other financial information, other than the fact that Marrowbone, over a period of years, had sustained *gross sales* of about $800,000,000.00. As discussed below, it was clearly erroneous to allow the jury to consider this evidence of gross sales without any evidence of the extent of profitability, if any, on those sales.[17] Absent evidence of profitability and net asset value, the jury had no information from which it could take into account the financial position of Marrowbone – nor did the trial court have such information in its post-trial review.

The trial court's comment in its "Final Order" (R. 1311-1331) that "the award is not unreasonable or monstrous given what's known from the record about the Defendant's financial position" ignores the fact that little or nothing is known about Marrowbone's financial position from the record.

(vi) There was no evidence presented to the jury, or to the trial court, with respect to the costs of the litigation.

Of course, no evidence as to the costs of the litigation was presented to the jury. More importantly, no effort was made by the trial court to obtain any such evidence following the trial. Although this court noted in Syllabus Point 4 to *Garnes* that the costs of litigation to a plaintiff might justify punitive damages, the costs of this litigation to plaintiff Radec are unknown. Of course, by no stretch of the imagination could Radec's litigation costs possibly have ap-

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[17] A high volume of sales doesn't necessarily equate with profitability. A number of new internet companies, like Amazon.com, have had hundreds of millions in sales and *no* profits.

proached the $1,541,648.00 awarded by the jury as punitive damages. This action was tried less than two years after it was filed, and it seems apparent that the total reasonable cost of the litigation to Radec, including all lawyer time (at a reasonable hourly rate) and expenses, all expert fees, etc. was substantially less than $100,000.00.

(vii) There were no criminal sanctions imposed on Marrowbone, but the trial court never became aware of that.

Marrowbone has never been criminally sanctioned for the alleged misrepresentations or promises made to Radec – for the simple reason that such conduct, even if it occurred, didn't constitute criminal activity. However, the trial court made no inquiry as to criminal sanctions before entering its "Final Order."

(viii) There are and have been no other civil actions against Marrowbone based on the alleged promises to Radec, but the trial court never became aware of that.

To date, there have been no other civil actions against Marrowbone based on the alleged promises or misrepresentations to Radec, but that fact was never introduced into evidence, nor was any inquiry made by the trial court in that regard.

(ix) Contrary to the recitals of the trial court in its "Final Order," reasonable attempts were made to settle this action prior to trial and the trial court was aware of those efforts.

In its brief commentary as to the *Garnes* factors in its "Final Order" (R. 1311-1331), the trial court concluded:

> "And, lastly, none of the factors which would work to mitigate a punitive damages award, such as prior criminal sanctions, other similar civil actions, and reasonable attempts at settlement appear present in this case."

The trial court was correct that there were no prior criminal sanctions and no other civil actions[18], but plainly wrong in concluding that no reasonable attempts were made at settlement. There were settlement discussions. More importantly, there was a court-conducted settlement conference immediately prior to trial in which the respective parties and their counsel retired to separate rooms at the Mingo County Courthouse with the trial judge moving back and forth between the separate rooms conveying offers and counteroffers in the settlement process. Thus, not only were attempts made at settlement, but, in fact, the trial court was involved in that process and, at the time, was well aware of the offers and counteroffers made.[19] The final settlement offer made by Marrowbone was $275,000.00, which, of course, was substantially in excess of the actual compensatory damages later awarded by the jury. It is difficult to imagine how Marrowbone's final settlement offer (conveyed to Radec through the trial judge) could be characterized as anything other than a reasonable attempt at settlement.

As is apparent from the foregoing discussion of the nine *Garnes* factors, a "meaningful and adequate" review leaves no doubt that the punitive damage award returned by the jury in this case was "grossly excessive." At the very least, the trial court should have reduced the punitive damage award to a 5 to 1 ratio. None of the *Garnes* factors suggest the need for a punitive damage award in excess of

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[18]Both of these conclusions were presumably guesswork on the part of the trial court, because, as noted above, no representations to that effect were ever made to the court, nor was any inquiry made by the court as to these matters.

[19]It's possible that the trial court had simply forgotten the pretrial settlement efforts by the time the "Final Order" was written several months later.

a 5 to 1 ratio. There were no aggravating factors, no "actual intention to cause harm," no "actual evil intention", and no contention by Radec to the contrary.

Given the facts of this case, a punitive damage award 17 times greater than compensatory damages not only violates *Garnes* and *TXO*, but it also violates the U.S. Constitution. If the 4 to 1 ratio of punitive to compensatory damages in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23, 24, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) was "close to the (Constitutional) line",[20] then the 17 to 1 ratio in the case at bar is way over the line and would violate Marrowbone's due process rights if allowed to stand.

(4) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO RADEC'S ORAL CONTRACT THEORY IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE OF THE EXISTENCE OF AN ORAL CONTRACT.

Under West Virginia law, a plaintiff may not avoid the condemnation of the Statute of Frauds[21] by invoking the "capable of performance" exception, unless the trial court

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[20] *See*, *BMW of North America, Inc.*, *supra*, 517 U.S. 559, 580, 116 S.Ct. 1589, 1602, 134 L.Ed.2d 809:

"In *Haslip* we concluded that even though a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line,' it did not 'cross the line into the area of constitutional impropriety." 499 U.S. at 23-24."

[21] In pertinent part, the applicable statute of frauds, W.Va. Code §55-1-1 provides in pertinent part:

> "No action shall be brought in any of the following cases: ...
>
> (f) Upon any agreement that is not to be performed within a year; ...
>
> Unless the offer, promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent."

determines the existence of such an oral contract by clear and convincing evidence *before* submitting the case to the jury. *See*, *Thompson* v. *Stuckey*, 171 W.Va. 483, 300 S.E.2d 295 (1983). No such finding was made by the trial court in this action. The trial court found only that "... there is evidence in the record" (T.Vol.4, P. 6) with respect to Radec's argument that the "capable of performance" exception to the statute of frauds was applicable. However, the court did not find that there was "clear and convincing" evidence of the existence of such a contract, as required under *Thompson* v. *Stuckey*, *supra*, in which this court concluded that "... there should be clear and convincing evidence that the contract in fact exists before the court submits the claim to a jury." 300 S.E.2d at 299. In the absence of such a finding – and in the absence of such evidence – the trial court erred in submitting the case to the jury on the theory of oral contract.

The alleged oral contract in the case at bar was not, *according to the plaintiff's evidence*, to be performed within one year. Radec's engineering expert, Ray Brainard, opined that Radec was capable of mining 483,000 tons a year (T.Vol.3, P. 112) and that there were approximately 2.2 million clean tons within the Drautz property to be mined (T.Vol.3, PP. 113, 114). Significantly, no witness for Radec testified that the alleged oral contract to allow Radec to mine the Drautz property was capable of being performed within a year.

The statute of frauds defense was raised in Marrowbone's answer and was raised and argued in Marrowbone's motion for judgment as a matter of law at the close of the plaintiff's case (T.Vol.4, P. 2). At that time, Radec responded by relying on the "capable of performance" exception, and had the opportunity thereafter to present rebuttal testimony to support that argument, i.e., testimony to the effect that the Drautz property was capable of

being mined within one year. But no such evidence was presented — presumably, because everyone associated with Radec was well aware that the Drautz property could not be mined within a single year.

During the argument of instructions in this action, the trial court acknowledged that *Thompson* v. *Stuckey*, *supra* requires the trial court to find that an oral contract exists by "clear and convincing evidence" before a claim for breach of that oral contract is submitted to a jury. However, after having acknowledged the burden imposed on it by *Thompson* v. *Stuckey*, the trial court nevertheless failed to make any such finding by "clear and convincing evidence":

> "This case (*Thompson* v. *Stuckey*) does go on to say that there should be clear and convincing evidence that a contract, in fact, exists before the court submits the claim to a jury and in this case there is evidence from the plaintiff that the jury could choose to believe that a contract, in fact, exists and it is sufficient for the court to submit the claim to the jury and the jury will have to decide." (T.Vol.4-A P. 136).

Then, following a discussion of some of the circumstantial and other evidence, the trial court further stated:

> "So, in reading all of these cases, it is possible that the jury could reasonably conclude that it is possible to mine within one year." (T.Vol.4-A, P. 137).

Shortly thereafter, counsel for Marrowbone again reminded the court that there had been no finding of "clear and convincing evidence" of the existence of an oral contract. (T.Vol.4-A, P. 141).

Never, at any time during the trial, did the trial court specifically find that there was clear and convincing evidence of the existence of an oral contract, and, absent such a finding, and, more importantly, absent such evidence, the issue should never have been submitted to the jury. *See, e.g.*, *Sayres* v. *Bauman*, 188 W.Va. 550, 425 S.E.2d

226 (1992) in which this court reversed the trial court for failing to determine the existence of an oral contract by clear and convincing evidence before submitting the case to a jury:

> "... this court's ruling in *Thompson* required the trial court to first determine the existence of an employment contract pursuant to the clear and convincing evidentiary standard before submitting the case to the jury. Given our analysis in Section I of this decision, this case should never have gone to the jury...." 425 S.E.2d 226, 231.

In the case at bar, the trial court's after-the-fact finding of clear and convincing evidence of the existence of an oral contract in its "Final Order" (R. 1311-1331) in no way satisfies the requirement of *Thompson* v. *Stuckey* that such a finding be made *before* the matter is submitted to a jury.

Likewise, the trial court's statement in its final order that:

> "... defendant failed to request a specific finding with regard to whether or not the court found 'clear and convincing' evidence of the existence of an oral contract ... therefore, the defendant has waived its argument."

is incorrect. As is apparent from the portions of the transcript quoted above, the court was well aware of the requirements of *Thompson* v. *Stuckey*, and defense counsel expressly reminded the court that no such finding by clear and convincing evidence had been made (T.Vol.4-A, P. 141). There was no waiver, and there was no finding of the existence of an oral contract by clear and convincing evidence by the trial court, *prior* to the issue being submitted to the jury.

The trial court's finding in its "Final Order" of clear and convincing evidence of an oral contract was not only after-the-fact, it was also plainly wrong. The only evidence

of an oral contract was the testimony of Radec's owners and employees. Radec had no documentary evidence and no testimony from any witness outside their own company. Such self-serving evidence is not, standing alone, clear and convincing:

> "An employee cannot satisfy the clear and convincing evidentiary burden by offering nothing more than his own testimony. '[T]he oral testimony of the beneficiary alone is a slender reed upon which to support a judgment' based on breach of an oral contract." *Thacker*, 800 F.Supp. at 383 (quoting Thompson v. Stuckey, 171 W.Va. 483, 300 S.E.2d 295, 298 (W.Va. 1983)). If Phillip's claim is based solely on his uncorroborated testimony and he can present no additional evidence of the existence of the contact, his claim must fail. See Thacker, 800 F.Supp. at 385."

Phillips v. *Consolidation Coal Company*, 153 F.3d 721 (unpublished opinion) (4th Cir.1998).

(5) THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO CONSTRUCTIVE FRAUD, WHICH NECESSARILY PREJUDICED MARROWBONE.

At the time instructions were argued, Marrowbone objected to Radec's proposed instructions as to constructive fraud (T.Vol.4-A, PP. 143, 144). It was pointed out to the Court that the complaint in this action didn't allege constructive fraud, and that Radec had introduced no proof of constructive fraud. (T.Vol.4-A, PP. 143, 144). Although Radec was unable to cite any allegation in the complaint as to constructive fraud and could point to no evidence supporting a constructive fraud theory (T.Vol.4-A, PP. 143, 144), the Court overruled Marrowbone's objection to the constructive fraud instructions (T.Vol.4-A, PP. 143, 144), which were read to the jury.

This court defined constructive fraud in *Stanley* v. *Sewell Coal Co.*, 169 W.Va. 72, 285 S.E.2d 679, 683 (1982):

> "Constructive fraud is a breach of a legal or equitable duty, which, irrespective of moral, guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. (citations omitted).
>
> Perhaps the best definition of constructive fraud is that it exists in cases in which conduct, although not actually fraudulent, ought to be so treated, that is, in which conduct is a constructive or *quasi-fraud*, which has all the actual consequences and legal effects of actual fraud. (citation omitted). Constructive fraud does not require proof of fraudulent intent. The law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence, both public and private. (citation omitted). In this respect, constructive fraud closely parallels the wrongful discharge in *Harless*, which contravened a substantial public policy principle."

Subsequent cases have continued to apply this definition. *See*, *Cordial* v. *Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248, 259, (1996) and *Wilt* v. *State Auto Mut. Ins. Co.*, 203 W.Va. 165, 506 S.E.2d 608, 612 (1998). In *Cordial*, *supra*, this court elaborated on its earlier definition by pointing out that constructive fraud is generally reserved for those cases where a fiduciary relationship exists between the parties, or the fraud violates an important public policy concern. 483 S.E.2d 248, 260. In the case at bar, there was no allegation of any fiduciary relationship between the parties, and there was no allegation of any important public policy concern. Likewise, there was no allegation of any violation of public policy or public rights or transactions. Also, there was no proof offered at trial of any of these matters.[22]

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[22]There was also no proof of actual fraud, as discussed above.

The constructive fraud instructions given by the trial court over the timely objections of Marrowbone, were not only erroneous, they were also prejudicial — prejudicial, because the trial court in effect told the jury that Marrowbone could be found guilty of fraud, *without proof of fraudulent intent* (T.Vol.4-A, PP. 162, 163), which is the critical difference between actual fraud and constructive fraud:

> "As we explained in Stanley, the critical difference between actual fraud and constructive fraud is that the latter 'does not require proof of fraudulent intent.' *Id.* at 77, 285 S.E.2d at 683."

Wilt v. *State Auto Mut. Ins. Co.*, 203 W.Va. 165, 506 S.E.2d 608, 612 (1998) (footnote 9).

Of course, instructions which are unsupported by the evidence, *State* v. *Wayne*, 162 W.Va. 41, 245 S.E.2d 838 (1978), overruled on other grounds, *State* v. *Kopa*, 173 W.Va. 43, 311 S.E.2d (1983) or which do not correctly state the law applicable to the facts, *State* v. *Belcher*, 161 W.Va. 660, 245 S.E.2d 161 (1978), must be refused – particularly where the incorrect instructions result in material prejudice. Under West Virginia law an erroneous instruction is presumed to be prejudicial and absent evidence to the contrary, warrants a new trial. *See*, *Wheeler* v. *Murphy*, 192 W.Va. 325, 452 S.E.2d 416, 427 (1994):

> "In order properly to perform its function, a jury must be given a correct statement of the applicable laws in the instructions issued by the court. *State* v. *Belcher*, 161 W.Va. at 665, 245 S.E.2d at 165-165. 'An erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudiced by such instruction.' (Citations omitted). The appellant was prejudiced by the two erroneous instructions issued by the court."

(6) THE TRIAL COURT ERRED IN OVERRULING MARROWBONE'S OBJECTION TO DOCUMENTS SHOWING GROSS INCOME OR GROSS REVENUES OF MARROWBONE.

Just prior to trial, and again during the trial, Marrowbone specifically objected to Plaintiff's Exhibits 19A and 27 (T.Vol.1, PP. 52-54; Vol.2-6, P. 279), both of which included the same document entitled "Marrowbone Development Company Historical Financial Statistics," showing gross sales revenue in excess of $800,000,000.00 over a six year time period. The "Marrowbone Development Company Historical Financial Statistics" was blown up by Radec and shown to the jury repeatedly. That document, and others like it, laid the foundation for Radec's closing argument in which its counsel improperly represented to the jury that Marrowbone "made" over a five year period $800,000,000.00 (T.Vol.5, PP. 14, 15).[23]

Although under *Garnes* the financial position of the defendant is relevant, Plaintiff's Exhibits 19A and 27 showing gross revenues over a six year time period in no way reflects the "financial position" of Marrowbone. Corporations can have enormous gross revenues and little or no net profits and little or no net assets. Radec's argument to the jury that Marrowbone had "made" $800,000,000.00 created an entirely false and prejudicial impression as to the

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[23]The failure of Marrowbone to object at the time of Radec's closing argument in no way constituted a waiver of Marrowbone's prior (on-the-record) objections to Plaintiff's Exhibits 19A and 27. Moreover, as this Court pointed out in footnote 5 of *Roberts* v. *Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 799 (1986), an objection and "curative instruction" from the court during the closing argument (which presumably would have been refused in any event, since the court had already overruled Marrowbone's objections to 19A and 27) would have served no useful purpose other than to reinforce Radec's point.

"financial position" of Marrowbone, and it was error to admit Exhibits 19A and 27 into evidence over Marrowbone's objection.[24]

(7) THE TRIAL COURT ERRED IN FAILING TO GRANT MARROWBONE'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO RADEC'S CLAIM FOR REHABILITATION EXPENSES, WHICH CLAIM WAS BARRED BY THE DOCTRINE OF ACCORD AND SATISFACTION.

Radec claimed an additional $89,629.89 in rehabilitation expenses, which allegedly had never been reimbursed by Marrowbone to Radec. The pertinent facts were undisputed. According to Radec's witnesses, Marrowbone orally agreed to reimburse Radec's rehabilitation expenses. Subsequently, Radec invoiced Marrowbone for the initial rehabilitation expenses. At that time, according to Radec's evidence, Marrowbone contested the amount of the invoice, and, in effect, offered to pay a lesser amount to Radec. Radec accepted this offer and prepared a revised invoice, which it submitted to Marrowbone and Marrowbone paid in full. According to Radec's evidence, all subsequent invoices for rehabilitation costs were calculated in the same manner by Radec and were paid in full by Marrowbone.

The elements of an accord and satisfaction are set forth in *Painter* v. *Peavy*, 192 W.Va. 189, 451 S.E.2d 755, 759 (1994), including (1) consideration, (2) offer of partial payment in full satisfaction of a disputed claim, and (3) acceptance of the partial payment.

In the case at bar, all three of these elements were clearly established by the undisputed evidence. There was consideration in the form of payments made by Marrow-

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[24] At the time those objections were made, the trial court should have conducted an on-the-record W.Va.R.Evid. 403 balancing test, but failed to do so. *See*, *Stafford* v. *Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210, 217 (1996).

bone. It was undisputed that the payments offered by Marrowbone were to be in full settlement of the disputed claim. It's undisputed that Radec accepted the payments made by Marrowbone with the knowledge that those payments were being made in full satisfaction of the rehabilitation costs. Thus, any claim with respect to the additional $89,629.89 is barred by the doctrine of accord and satisfaction. *See*, *Summers* v. *Summers*, 186 W.Va. 635, 413 S.E.2d 692, 698 (1991):

> "Once the parties have fully complied with the terms of the compromised agreement, the doctrine is invoked and acts as a bar to all actions upon the same agreement."

Therefore, the jury should not have been permitted to return a verdict for the $89,629.89 and, since that was the only amount awarded as compensatory damages by the jury, the award of punitive damages must also be set aside. A jury may not return an award for punitive damages without compensatory damages.

Garnes, *supra*, 413 S.E.2d 897, 908 (1982).

(8) THE TRIAL COURT ERRED IN FAILING TO GRANT MARROWBONE'S MOTION IN LIMINE TO PROHIBIT RADEC FROM INTRODUCING EVIDENCE AS TO UNION/NON-UNION ISSUES WHICH WERE IRRELEVANT AND PREJUDICIAL TO MARROWBONE.

The trial court's failure to grant Marrowbone's motion in limine to prohibit the introduction of evidence as to union/non-union issues (T.Vol.1, PP. 37-39) resulted in the introduction by Radec of prejudicial and irrelevant evidence with respect to an alleged "plot" by Marrowbone to shift coal production away from its own union employees. Radec introduced evidence (and argued) that Marrowbone, over a period of time, intended to phase out its own union production of coal and transfer coal production to a related

non-union company named Heritage.[25] This evidence had *nothing* to do with any legitimate issue in the action. In *no way* did this evidence tend to support Radec's theory of an oral contract to mine the Drautz property. The sole and only conceivable purpose for introducing the evidence was to prejudice the jury against Marrowbone, and it appears from the outrageously large punitive damage award that this ploy succeeded.

Under Rule 402 of the West Virginia Rules of Evidence, "Evidence which is not relevant is not admissible." And under Rule 403, even where evidence is relevant, such evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The union/non-union evidence should have been excluded under either Rule 402 or Rule 403, or both. In any event, the trial court should have conducted an on-the-record Rule 403 balancing test, but failed to do so. *See*, *Stafford* v. *Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210, 217 (1996).

In justifying its decision to allow this prejudicial testimony, the court, in its "Final Order" (R. 1311-1331), states

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[25] In his opening statement, Radec's counsel set the tone for Radec's repeated efforts to convince the jury that Marrowbone was out to bust the union – a proposition which was untrue, irrelevant and highly prejudicial:

> "The question is if you have to mine coal more cheaply how do you do it? Well it was a pretty good, slick idea that Marrowbone came up with for Zeigler. What they did was to form in 1995, as I said, Heritage Corporation and what it was going to do was mine all its coal thru non-union contract miners. You don't have to pay the expense, the cost goes down, all tonnage was sold to MDC, by the way, in fact, who is Marrowbone – was sold to Marrowbone and Marrowbone's mines are operated by contractors." (T.Vol.1, PP. 89, 90).

that the evidence was admitted for purposes of impeaching Marrowbone's witnesses and corroborating Radec's witnesses. In fact, it did neither, and the court cites no particular instance of such impeachment or corroboration.

Likewise, the trial court's assertion that the union/non-union evidence "tended to support the plaintiff's assertion of fraud" is plainly wrong. The evidence introduced was to the effect that control of the Drautz property was to be shifted from Marrowbone, a union company, to Heritage, a non-union company, owned by the same common parent corporation, Zeigler Coal Holding Company. According to plaintiff's theory, this shift was planned to allow the property be mined on a non-union basis. Although Radec's evidence on this point very well may have succeeded in convincing the jury that Marrowbone was anti-union, it in no way supported Radec's theory of fraud – for the simple reason that evidence of a proposed transfer of Drautz to Heritage (which never happened in any event) in no way corroborates the alleged promise of Drautz to Radec.

The trial court also concluded that even if the union/non-union evidence prejudiced Marrowbone, "It was harmless." Just how the court arrived at this conclusion is unknown. It is submitted that evidence to the effect that Marrowbone was attempting to bust the union may very well have been the principal reason for the Mingo County jury's $1.5 million punitive damage award in this action. We don't know and have no way of finding out what the jury's actual reaction to this union/non-union evidence may have been, since the court instructed the lawyers and the parties at the end of the trial to not approach any member of the jury directly or indirectly (T.Vol.5, PP. 72, 73).

C. Relief Prayed For.

For the foregoing reasons, Appellant, Mountaineer Coal Development Company, d/b/a Marrowbone Development Company, prays that this Court:

1. Reverse the judgment entered by the trial court and remand the action for a new trial.

2. Grant such other and further relief as this Court deems appropriate.

Respectfully submitted,

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company

By /s/ Richard J. Bolen
Of Counsel

Richard J. Bolen
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181
Counsel for Appellant Mountaineer Coal Development Company, d/b/a Marrowbone Development Company

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing BRIEF OF APPELLANT on the following persons by mailing a copy thereof to their last known address on July 24, 2000, as follows:

Robert Taylor, Esq.
Rachael Stickler, Esq.
Masters & Taylor
181 Summers Street
Charleston, WV 25301-2177

/s/ Richard J. Bolen

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 27804

RADEC, INC., a West Virginia Corporation, - - - - *Plaintiff Below, Appellee*

v.

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company a West Virginia Corporation, *Defendant Below, Appellant*

From the Circuit Court of Mingo County
Civil Action No. 97-C-312

PETITION FOR REHEARING—
Filed January 1, 2001

Richard J. Bolen
WV State Bar ID No. 392
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722
(304) 529-6181

Counsel for Appellant, Mountaineer Coal Development Company, d/b/a Marrowbone Development Company, a West Virginia corporation

Pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure, Defendant Below, Appellant, Mountaineer Coal Development Company, d/b/a Marrowbone Development Company ("Marrowbone") petitions for rehearing, as follows.

INTRODUCTION

The Trial Court admittedly erred in failing to instruct the jury as to the due process limitations on punitive damage awards. This Court has now flatly declined to even consider, much less remedy, this Constitutional error. The Court justifies ignoring this fundamental flaw by shifting the blame to Marrowbone for "inviting" the error. In so doing, the Court has misapprehended both the doctrine of "invited error" and the doctrine of "plain error," as discussed in the first two sections of this petition.

In its own post-trial review of the jury's $1,541,638 punitive damage award, this Court searches for and then finds the "actual evil intention" required to justify a punitive damage award more than 5 times actual damages. But, the Court, in demonizing Marrowbone as "evil," has substantially misapprehended the facts, as discussed in the third section of this petition. The true facts in the record don't support a finding of "actual evil intention", nor a punitive damage award 17 times greater than actual damages.

Finally, in approving punitive damages in what is plainly nothing more than a breach of contract action, this Court has overlooked an important principle of the law of fraud, as discussed in the fourth section of this petition.

This case deserves a better review of the record and more thoughtful consideration of the long-term implications of approving the jury's erroneous punitive damage award based on no evidence other than self-serving allegations of breach of oral contract. If the uncorroborated "proof" offered by Radec in this case warrants massive punitive damages, no one in West Virginia with even a nickel in her pocket should rest easy at night.

1. IN REFUSING TO EVEN CONSIDER THE TRIAL COURT'S ADMITTED CONSTITUTIONAL ERROR IN FAILING TO GIVE THE *GARNES'* INSTRUCTIONS, THIS COURT HAS MISAPPREHENDED AND MISAPPLIED THE DOCTRINE OF "INVITED ERROR"

The trial court's admitted failure to include any of the *Garnes'* elements in its punitive damage instructions constituted error of constitutional magnitude, as this Court is well aware. This Court fully understands that the jury should have been instructed, at the very least, that any punitive damage award returned by them had to bear a "reasonable relationship" to compensatory damages. The jury wasn't told that, wasn't given any guidance or limitation as to amount, and proceeded to return a punitive damage award 17 times greater than compensatory damages.

This Court has now refused to even consider this constitutional deficiency in the punitive damage instructions, principally because the Court has endorsed Radec's blame-shifting theory that "Marrowbone invited the error by objecting to such an instruction (*Garnes*) being given." The Court's Opinion offers no analysis of the facts in support of its conclusion that Marrowbone invited the error.

The undisputed facts, though not stated in the Court's Opinion, are these: The Trial Court drafted its own "unified charge", including punitive damage instructions, which contained no *Garnes'* elements. The Court then presented its charge to the parties and allowed the parties to make whatever objections they might choose to make (T.Vol.4-A,P.138). The Trial Court never requested the assistance of the parties in drafting or improving its charge. The Trial Court did ask the parties to review their own proposed instructions and "weed out" those that were covered by the Court's charge (T.Vol.4-A,P.138). In response to that request, Radec's counsel withdrew all of Radec's proposed instructions other than Nos. 11, 12, 14, 14A, 15, 17, 18, 21, 22, 23, 24, 25, 26, 37, and 50 (T.Vol.4-A,P.139). After congratulating the Trial Court on doing "a very good

job" in its charge (T.Vol.4-A, P.139), Radec never, at any time or in any way, suggested that the punitive damage instructions drafted by the Trial Court were constitutionally inadequate or needed to be modified or amended.

Marrowbone's counsel, in responding to the Court's charge, specifically objected to the Court's proposed instructions to the jury on punitive damages (T.Vol.4-A,PP.164,165,171,172), not because they failed to include *Garnes*' elements, but because the proof in this breach of contract action simply didn't warrant punitive damage instructions at all (T.Vol.4-A,P.145).

The Trial Court then went through each of the instructions which the plaintiff had not withdrawn (T.Vol.4-A,PP.173-189). In addition to the instructions not previously withdrawn by Radec, the Trial Court also solicited comments as to Radec's proposed Instruction No. 40 (T.Vol.4-A,P.189). Just why the Court asked for comments as to Radec's proposed Instruction No. 40, which had been previously withdrawn by Radec, is unknown. Radec's previously withdrawn Instruction No. 40 contained *Garnes*' elements. In response to the Court's solicitation as to comments with respect to 40, Marrowbone's counsel properly and consistently preserved its continuing objection to any and all punitive damage instructions.

> "We object. You've covered punitive damages repeatedly in your charge. We've objected to it, but – " (T.Vol.4-A, P.189).

Without even allowing Marrowbone's counsel to finish the sentence, Radec's counsel quickly reiterated Radec's withdrawal of Instruction No. 40, stating:

> "That's fine, Your Honor. We'll withdraw it." (T.Vol.4-A, P.189).

These facts do not justify the Court's reliance on the doctrine of "invited error," for several different reasons:

a. *The error in the Trial Court's instructions was not introduced by, brought about by or caused by Marrowbone.*

The facts simply don't add up to "invited error" under any of the various formulations of the doctrine found in

West Virginia case law. The error in the Court's instructions was not "introduced by or invited by the party seeking reversal." Syl. Pt. 4, *State* v. *Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996). The error in the instructions was not "brought about by (Marrowbone's) own motion, and which it alone caused." Syl. Pt. 1 of *McElhinney* v. *Minor*, 91 W.Va. 755, 114 S.E.147 (1922). The error was not "introduced into the record by instructions given at the instance of or was invited by (Marrowbone)." Syl. Pt. 5, *State* v. *Calhoun*, 67 W.Va. 666, 69 S.E. 1098 (1911).

The punitive damage instructions in this case were given exactly as they were originally drafted by the Trial Court. Marrowbone didn't induce the Court to write improper instructions, and Marrowbone didn't prevent Radec, the party proposing that the jury be instructed on punitive damages, from assisting the Court in drafting the instructions properly. Radec's counsel *never at any time* raised the *Garnes*' issue, never suggested in any way to the Court that its instructions were inadequate or improper.[1]

b. *The doctrine of invited error doesn't apply to court-drafted instructions.*

The courts of West Virginia and other jurisdictions have repeatedly held that where instructions are drafted by the court, and not offered by the party seeking redress on appeal, the doctrine of invited error simply doesn't apply. *See*, for example, *State of Idaho* v. *Blake*, 133 Id. 237, 985 P.2d 117 (1999):

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[1] *See*, the Fourth Circuit's recent decision in *Livingston* v. *Murdaugh*, 183 F.3d 300 (4thCir.1999), holding that a defendant did not invite error in suggesting an erroneous instruction when the solicitor "led the argument with the trial judge," i.e., advocated the erroneous instruction. Marrowbone may have objected to Radec's previously withdrawn Instruction No. 40, but, in fact, Radec withdrew it from the Court's consideration, and the Court, therefore, never ruled on Marrowbone's objection. Radec has no more standing to invoke the doctrine of "invited error" than did the solicitor in the *Livingston* case.

> "The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to give or not give an instruction from later challenging that decision on appeal. Blake's counsel's concurrence did not invite the court to give the challenged instructions; the judge had already made that decision. It appears that the trial court was merely giving the parties an opportunity to object on the record after the court had decided on the instructions in an informal conference."

To like effect, see, *State of Kansas* v. *McMahon*, 812 P.2d 766 (Kan.1991):

> "The trial court gave the instruction of its own volition without objection from either party. Defendant's failure to object in this case does not rise to the level of invited error."

See, also, Ft. Worth & D.C.Ry.Co. v. *Amason*, 239 S.W. 359 (Tex.Civ.App.1922):

> "It is difficult to avoid the conclusion from this statement that the special charges were presented to the trial judge after he had prepared his main charge. If this is true, then the appellant did not invite the error of which it complains." 239 S.W. 359, 362.

Consistent with all of the above, this Court held in *State* v. *Dozier*, 163 W.Va. 192, 255 S.E.2d 552, 555 (1979):

> "Moreover, had the infirm instruction been contained in a charge prepared by the trial court, see, W.Va. Code §56-6-19, and given without objection by defense counsel, or had the instruction been offered by the prosecution without objection by defense counsel, the trial court or this court could 'in order to avoid manifest injustice or clear prejudice to a party, notice plain error in the giving of or refusal to give an instruction.' (citation omitted)."

Thus, in the case at bar, since the Trial Court alone drafted the constitutionally defective instructions without participation by either of the parties, there is no invited error, and there wouldn't be, even if Marrowbone had entirely failed to object to the erroneous instructions. In fact,

of course, Marrowbone did object to the erroneous instructions, though on different grounds. It goes without saying that "a party does not invite an error by filing objections to it." *Ft. Worth & D.C.Ry.Co.* v. *Amason*, 239 S.W. 359 (Tex.Civ.App.1922).

c. *The doctrine of invited error is applicable only where a party seeks to induce error and the court actually commits error in response to that effort.*

Significantly, an attempt to induce error rises to the level of "invited error" only if it is successful, i.e., only if, in fact, it does achieve the intended purpose and result in the court actually committing error. *See*, for example, *State of Texas* v. *Manning*, 833 S.W.2d 322 (Tex.Civ.App.1992):

> "This concept of 'invited error' may be stated: If, during the progress of a cause, any party thereto request(s) or move(s) the court to make an erroneous ruling, and the court rule(s) in accordance with such request or motion, he cannot take advantage of the error on appeal."

See, also, Comer v. *Ritter Lumber Co.*, 59 W.Va. 688, 53 S.E. 906, 907 (1906). In the case at bar, it's important to recognize that the Court took absolutely no action, and committed no error, in response to Marrowbone's objection to Radec's previously withdrawn Instruction No. 40. The Court didn't have a chance to take any action, because Radec's counsel cut Marrowbone's counsel off in mid-sentence and withdrew the instruction – for the second time. The Court noted that proposed Instruction 40 had been withdrawn, but made no ruling on Marrowbone's objection to that instruction, and, more importantly, made no change in the Court's proposed instructions. The error in the instructions given to the jury was in no way drafted by, suggested by, or induced by Marrowbone, and the Trial Court made no ruling and took no action based on Marrowbone's objection to Radec Instruction No. 40.

d. *The doctrine of invited error applies only where there is evidence in the record of a deliberate strategy to induce error.*

This Court has recognized that the doctrine of "invited error" is ". . . limited to those cases 'where the error is truly invited as a part of a trial strategy or tactic.' (citations omitted)." *State* v. *Angel*, 173 W.Va. 620, 319 S.E.2d 388, 395 (1984); *State* v. *Dozier*, 163 W.Va. 192, 255 S.E.2d 522, 555 (1979). The Supreme Court of California decision cited and relied upon in both *Dozier* and *Angel*, i.e., *People* v. *Graham*, 71 Cal.2d 303, 78 Cal.Rptr.217, 455 P.2d 153 (1969), held that the doctrine of "invited error" applied only ". . . in that special situation in which the defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of an instruction." 455 P.2d 153, 162. In *Graham*, the defense lawyer had "expressly" stated to the trial court that he considered it tactically to defendant's advantage to waive a manslaughter instruction.

Obviously, there is no evidence in the record in the case at bar of any "expressly" stated tactical waiver or decision by Marrowbone's counsel to forego the due process protections of *Garnes*. Consequently, the doctrine of "invited error" is inapplicable. Marrowbone's proper and continuing objection to any and all punitive damage instructions clearly was not a tactical effort to inject error into the record. To the contrary, it was an effort – unsuccessful as it turned out – to prevent error prejudicial to Marrowbone, the error of instructing the jury on punitive damages in a breach of contract action.

e. *Even where error is induced, the doctrine of invited error is applicable only if the court was misled.*

The Supreme Court of California in *Norgart* v. *The Upjohn Company*, 21 Cal. 4th 383, 981 P.2d 79 (1999) recently held that even where error is induced, the doctrine of "invited error" is inapplicable if there is no evidence that the trial court was misled. 981 P.2d 79, 92.

Thus, even if Marrowbone had induced the commission of error in this case, which it clearly did not, the doctrine of "invited error" would be inapplicable, since it is undisputed that Marrowbone in no way misled the Trial Court.

The Trial Court knew that Marrowbone opposed any punitive damage instructions and knew why Marrowbone consistently and properly objected to all such instructions. There was no misleading of the Trial Court.

2. THIS COURT HAS OVERLOOKED THE FACT THAT CONSTITUTIONAL ERROR IS PLAIN ERROR, WHETHER "INVITED" OR NOT

In footnote 6 to its Opinion in the case at bar, the Court states that: "We will not invoke the plain error doctrine to examine an error that was not only not objected to, but was actually invited." The Court then cites *State* v. *Knuckles*, 196 W.Va. 416, 421, 473 S.E.2d 131, 136 (1996) for the proposition that "waiver" necessarily precludes salvage by plain error review. *Knuckles* involved a knowing, deliberate, on-the-record waiver of a right, after the trial court specifically warned the defendant that by doing so he "was waiving the right to object." Obviously, that is far removed from the situation in the case at bar in which there was no "waiver", no intentional relinquishment of a known right.

The second case cited by this Court in footnote 6 of its Opinion, *State* v. *Redden*, 199 W.Va. 660, 487 S.E.2d 318 (1997) is in point. There it was held that the plain error rule would be used to remedy an error, even though that error was "invited", because the error, as this Court notes in footnote 6, "involved a fundamental right secured by the state and federal constitutions." This Court's Opinion in the case at bar does not, however, acknowledge or address the fact that the trial court's error in omitting the required *Garnes'* elements from the punitive damage instructions, like the error in *Redden*, was an error of constitutional magnitude. *See*, *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). *State* v. *Redden*, *supra*, is not alone in the jurisprudence of West Virginia in holding that constitutional errors will be reviewed under the plain error rule, whether "invited" or not. The principle is well-settled. *See*, for example, *State* v. *Dozier*, 163 W.Va. 192, 255 S.E.2d 552, 555 (1979); *State*

v. *Hamilton*, 184 W.Va. 722, 403 S.E.2d 739, 743 (1991); *State* v. *Allen*, 1999 W.Va. Lexis 134 (1999); *State* v. *Salmons*, 203 W.Va. 561, 509 S.E.2d 842, 852 (1998); *State* v. *Harris*, 189 W.Va. 423, 432 S.E.2d 93, 95 (1993); *State* v. *Moore*, 186 W.Va. 23, 409 S.E.2d 490, 494 (1990); and *State* v. *Mayo*, 191 W.Va. 79, 443 S.E.2d 236, 244 (1994).

3. THE COURT HAS MATERIALLY MISAPPREHENDED THE FACTS IN CONCLUDING THAT MARROWBONE'S ACTIONS WERE "EVIL"

Syllabus Point 15 of *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff. 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) allows a punitive damage verdict of more than 5 times compensatory damages only where there is proof that "the defendant has acted with actual evil intention." Thus, to affirm the jury's 17-to-1 punitive damage award in the case at bar, this Court had to look for and try and find "actual evil intention." In doing so, the Court relied upon "facts" which aren't facts at all. First, the Court's statement on page 15 of its Opinion that:

> "It is clear from the evidence that Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5"

is totally at odds with all of the evidence in the record. No evidence, not even the self-serving testimony of Radec's owners, ever suggested that Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5. To the contrary, it was clear from the evidence that no one knew in advance that Radec No. 5 would be unprofitable to mine. Radec No. 4, which was immediately adjacent to Radec No. 5 in the same coal seam, had admittedly been profitable for Radec. There certainly was no evidence that the rehabilitation of Radec No. 5 might ruin Radec financially – particularly since Marrowbone had agreed to reimburse those costs and did so to the extent Radec asked for reimbursement.

A second related misstatement of the facts is set forth at the top of page 8 of the Court's Opinion:

> "There was evidence that Radec incurred debts totaling $1.1 million dollars in rehabilitation costs relating to Radec No. 5."

Not true. Radec never contended that it incurred debts of $1.1 million in rehabilitation costs. Radec admitted that, with the exception of $89,629.89, it was fully reimbursed for all of the rehabilitation costs it incurred.

A third related material inaccuracy is found at the bottom of page 2 of the Court's Opinion:

> "Eventually, Marrowbone rejected paying to Radec the amounts requested by Radec for rehabilitating Radec No. 5."

Also not true. Radec was admittedly fully reimbursed for all rehabilitation expenses for which it sought reimbursement prior to the filing of this action.

A fourth material inaccuracy is found at the bottom of page 2 of the Court's Opinion:

> "Radec then concluded that, as a result of Marrowbone's refusal to pay all of the rehabilitation costs for Radec No. 5, it would no longer be profitable for Radec to remove coal from Radec No. 5."

This is plainly wrong. The alleged unprofitability of Radec No. 5 had *nothing* to do with any refusal on the part of Marrowbone to pay rehabilitation costs for Radec No. 5. Radec contended that it was not profitable to mine Radec No. 5 because of the mining conditions in Radec No. 5.

The Court's misunderstanding of the facts paints a substantially grimmer picture of Marrowbone than the actual facts warrant. Given the Court's false impression of Marrowbone's culpability, there's little wonder the Court adopted Radec's theory of corporate evil. If the Court will spend the time to get the facts straight, it will recognize that the evidence in the record simply does not support the conclusion that Marrowbone was "evil" and self-serving" and does not justify a 17-to-1 punitive damage award under *TXO*.

4. THE COURT HAS MATERIALLY MISAPPREHENDED AND MISAPPLIED THE LAW OF FRAUD

The Court's *per curiam* Opinion ignores the universally recognized principle that:

> "Fraud cannot be predicated on a promise not performed. To make it available, there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or his property." (emphasis in the original). Syl. Pt. 3 *Croston* v. *Emax. Oil Co., a Virginia corp.*, 195 W.Va. 86 464 S.E.2d 728 (1995).

In this case, there was no false assertion in regard to any *existing* matter, and none is cited in the Court's Opinion. The facts relied upon by the Court are recited on pages 6-8 of its Opinion. Nowhere does the Court recite any evidence of misrepresentation of an existing fact.

It's certainly true, as stated in the Court's Opinion, that Richard Goff testified (1) that Howard Epperly promised Radec the Drautz property, (2) that another Marrowbone official had taken Radec people to see the Drautz property, and (3) that Radec would not have continued to rehabilitate and mine Radec No. 5, but for the promise of the Drautz property. In short, there was testimony as to a promise and consideration for the promise. That's not misrepresentation of an existing fact and not fraud.

It's also true, as the Court says, that Radec offered evidence that Marrowbone represented that it was preparing the necessary paperwork to secure government approval for mining the Drautz property. But that was a true representation. Marrowbone did have the necessary paperwork prepared to secure government approval for mining the Drautz property and filed that paperwork with the state government.

The Court is also correct in stating that there was evidence that the mining application for the Drautz property was initially filed under the name of Marrowbone and later transferred to Heritage, and that "The mining application

for the Drautz property was never listed in the name of Radec." The Court's Opinion seems to imply that there was evidence that Marrowbone had promised that the permit for the Drautz property would be put in Radec's name. There was *never* any testimony or evidence to that effect by anyone.

From all of this, the Court concludes that ". . . it was proper to allow Radec's fraud theory to go to the jury." None of the evidence cited supports this conclusion. The evidence cited by the Court, and the evidence offered by Radec at trial, at best, proved that Marrowbone made a promise, Radec relied on that promise, and Marrowbone later reneged on the promise. That doesn't constitute fraud under the law of West Virginia or the law of any other jurisdiction.

Respectfully Submitted

MOUNTAINEER COAL
DEVELOPMENT COMPANY,
d/b/a Marrowbone Development
Company

By /s/ Richard J. Bolen
Of Counsel

Richard J. Bolen
WV State Bar ID No. 392
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722
(304) 529-6181

Counsel for Appellant, Mountaineer Coal
Development Company, d/b/a Marrowbone Development
Company, a West Virginia corporation

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing PETITION FOR REHEARING on the following persons by mailing a copy thereof to their last known address this 10th day of January, 2001, as follows:

Robert Taylor, Esq.
Rachael Stickler, Esq.
Masters & Taylor
181 Summers Street
Charleston, WV 25301-2177

/s/ Richard J. Bolen

IN THE

CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No.: 97-C-312

RADEC, INC., a West Virginia corporation, - - - - - - - - - *Plaintiff,*

v.

HOWARD EPPERLY, LARRY JONES, and MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia corporation, - - - - - - *Defendants.*

DEFENDANTS' MOTION FOR REVIEW OF PUNITIVE DAMAGE AWARD

Defendant moves the Court to make a "meaningful and adequate review" of the punitive damage award returned by the jury in this action, based on the requirements of *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991) and subsequent decisions.

Mountaineer Coal Development Company
d/b/a Marrowbone Development Company

/s/ Richard J. Bolen

By Counsel

Richard J. Bolen - WV State Bar ID No. 392
Melissa A. Dodd - WV State Bar ID No. 7440
Robert R. Waters - WV State Bar ID No. 7627
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

IN THE

CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No.: 97-C-312

RADEC, INC., a West Virginia corporation, - - - - - - - - - - *Plaintiff,*

v.

HOWARD EPPERLY, LARRY JONES, and MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia Corporation, - - - - - - *Defendants.*

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR REVIEW OF PUNITIVE DAMAGE AWARD

Garnes v. *Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1991) and subsequent decisions have now made it clear that trial courts must make a "meaningful and adequate review" of all punitive damage awards. *See,* for example, *Vandevender* v. *Sheetz, Inc.,* 200 W.Va. 591, 490 S.E.2d 678, 686 (1997), U.S. cert denied, 139 L.E.2d 871:

> "Following the return of a punitive damages award, Garnes requires the trial court to make a 'meaningful and adequate review' of the award.
>
> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:
>
> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;

> (3) any other civil actions against the same defendant, based on the same conduct; and
>
> (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Syl. Pt. 4, in part, *Garnes,* 186 W.Va. at 659, 413 S.E.2d at 900."

In short, when any punitive damage award is returned, the trial court must review "at a minimum" the five factors that must be included in punitive damage instructions (and weren't in the case at bar) plus the four additional factors listed above, a total of nine factors.

After the trial court has made a "meaningful and adequate review" of all nine of these factors, at a minimum, the party against whom punitive damages have been awarded, may petition the Supreme Court of Appeals for review of the punitive damages award, and the Court has committed itself to review *all punitive damage awards. See, Garnes* v. *Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1992):

> "Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." Syl. Pt. 5.

In subsequent decisions, the Court has declined to review punitive damage awards unless and until the trial court has first reviewed the award. Accordingly, the Supreme Court of Appeals has remanded actions to the trial court in which the trial judge failed to make the "meaningful and adequate review" required by Garnes and subse-

quent decisions. In that regard, *see, Alkire* v. *First Nat. Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122, 130 (1996):

> "As we noted, Mr. Alkire invites this court to perform a *de novo* review of all of the *Garnes* factors and thereafter to reinstate the entire punitive damage award of $1,050,000. We decline that invitation since under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of *Garnes* v. *Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp.* v. *Alliance Resources Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Thereafter, and upon petition, this court will review the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*.
>
> Because the trial court, for reasons we have discussed, did not submit the punitive damage award to a Garnes' analysis to determine whether or not it was excessive, such an analysis must now be done upon remand."

Clearly, then, this Court must perform the nine step analysis mandated by *Garnes*.

Respectfully Submitted,

Mountaineer Coal Development Company
d/b/a Marrowbone Development Company

/s/ Richard J. Bolen

By Counsel

Richard J. Bolen - WV State Bar ID No. 392
Melissa A. Dodd - WV State Bar ID No. 7440
Robert R. Waters - WV State Bar ID No. 7627
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that DEFENDANTS' "MOTION FOR REVIEW OF PUNITIVE DAMAGE AWARD" and "MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR REVIEW OF PUNITIVE DAMAGE AWARD" were served upon counsel named below by depositing the same in the U.S. mail, postage prepaid, this 8th day of June, 1999 addressed as follows:

Robert Taylor
Rachael Stickler
Masters & Taylor
181 Summers Street
Charleston, WV 25301-2177

/s/ Richard J. Bolen

Richard J. Bolen - WV State Bar ID No. 392
Melissa A. Dodd - WV State Bar ID No. 7440
Robert R. Waters - WV State Bar ID No. 7627
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

IN THE

CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No.: 97-C-312

RADEC, INC., a West Virginia corporation, - - - - - - - - - - *Plaintiff,*

v.

HOWARD EPPERLY, LARRY JONES, and MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia corporation, - - - - - - *Defendants.*

DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND/OR FOR A NEW TRIAL AND/OR FOR A REMITTITUR

Pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, defendants renew their motion for judgment as a matter of law and/or for a new trial and/or for a remittitur. The grounds for this motion are as follows:

1. The Court erred (1) in failing to grant Defendants' Motion for Judgment as a Matter of Law on the grounds that Plaintiff's oral contract theory was barred by the statute of frauds and (2) instructing the jury as to Plaintiff's oral contract theory in the absence of a finding by the Court that there was clear and convincing evidence of the existence of an oral contract.

2. The Court erred in failing to grant Defendants' Motion for Judgment as a matter of law as to Plaintiff's theory of fraud, absent proof of fraud and fraud damages.

3. The Court erred in improperly instructing the jury as to punitive damages.

4. The Court erred in failing to grant Defendants' Motion In Limine to prohibit Plaintiff from introducing, for punitive damages purposes, documents showing gross income or gross revenues of Defendant.

6. The jury's verdict should be set aside or the Court should grant a remittitur with respect to punitive damages in that the punitive damages awarded don't bear a reasonable relationship to the actual compensatory damages awarded.

7. The Court erred in failing to grant Defendant's Motion For Judgment as a Matter of Law as to Plaintiff's claim for rehabilitation expenses, which claim was barred by the doctrine of accord and satisfaction.

8. The Court erred in failing to grant Defendant's Motion In Limine to prohibit the Plaintiff from introducing evidence as to union/nonunion issues which were irrelevant and prejudicial to Defendant.

9. The Court should grant a new trial in that Plaintiff improperly and deliberately introduced testimony as to past criminal activity of Marrowbone officials, in clear violation of the Court's ruling sustaining Defendant's Motion In Limine to prohibit such testimony.

10. The Court erred in instructing the jury as to constructive fraud.

Mountaineer Coal Development Company
d/b/a Marrowbone Development Company

/s/ Richard J. Bolen

By Counsel

Richard J. Bolen - WV State Bar ID No. 392
Melissa A. Dodd - WV State Bar ID No. 7440
Robert R. Waters - WV State Bar ID No. 7627
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

IN THE

CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

Civil Action No.: 97-C-312

RADEC, INC., a West Virginia corporation, - - - - - - - - - *Plaintiff,*

v.

HOWARD EPPERLY, LARRY JONES, and MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia corporation, - - - - - - *Defendants.*

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND/OR FOR A NEW TRIAL AND/OR FOR A REMITTITUR

1. The Court erred (1) in failing to grant Defendants' Motion for Judgment as a Matter of Law on the grounds that Plaintiff's oral contract theory was barred by the statute of frauds and (2) instructing the jury as to Plaintiff's oral contract theory in the absence of a finding by the Court that there was clear and convincing evidence of the existence of an oral contract.

Under West Virginia law a plaintiff may not enforce an alleged oral contract that, in fact, has not been performed within one (1) year, unless the trial court determines the existence of such an oral contract by clear and convincing evidence before submitting the case to the jury. No such finding was made by the Court in this action. The Court did find that there was evidence from which a jury could reasonably conclude that there was an oral contract, but the Court did not find that there was clear and convincing

evidence of the existence of such a contract. In the absence of such a finding, the Court erred in submitting the case to the jury on the theory of oral contract.

In pertinent part, the applicable statute of frauds, W.Va. Code §55-1-1 provides in pertinent part:

> "No action shall be brought in any of the following cases: ...
>
> (f) Upon any agreement that is not to be performed within a year; ...
>
> Unless the offer, promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent."

The alleged oral contract in the case at bar was not, *according to the Plaintiff's evidence,* to be performed within one year. The Plaintiff's engineering expert opined that the Plaintiff could reasonably hope to mine 483,000 clean tons of coal per year from the allegedly promised Drautz property and that there were a total of 2.3 million clean tons within the property to be mined. Likewise, Ron Goff of the family which owns and operates Radec testified that the mining of the Drautz property would take five or six years. Significantly, no witness for the Plaintiff testified that the alleged oral contract was capable of being performed within a year.

Very similar facts were addressed by the Supreme Court of Appeals in *Thompson v. Stuckey,* 171 W.Va. 483, 300 S.E.2d 295 (1983). In that case, after finding that the evidence indicated that the parties did not contemplate that the alleged oral contract in that action was to be performed within one year, the court, nevertheless, concluded that the contract came within the "capable of performance" exception to the statute of frauds. However, the Court modified the "capable of performance" exception to the statute of frauds on a prospective basis, as follows:

> "To damp the inevitable vacillation between strict and relaxed interpretation that individual justice demands, we shall henceforth, looking to the policy of the an-

> cient statute of frauds, require more than an entirely mechanical application of the 'capable of performance' exception. Where a plaintiff seeks to avoid the condemnation of *W.Va. Code,* 55-1-1(f)(1923), if the disputed contract was not in fact performed within one year by the plaintiff, there should be clear and convincing evidence that the contract in fact exists *before the court submits the claim to a jury.* This evidence may include circumstantial evidence, apparent reliance, similar practices of the defendant in particular or the industry in general in similar situations, or anything else that will *convince the court* that the defendant has been protected from an utterly spurious claim." 300 S.E.2d 295, 299. (emphasis added)

In the subsequent case of *Sayres v. Bauman,* 188 W.Va. 550, 425 S.E.2d 226 (1992), the Supreme Court of Appeals applied the rule laid down in Thompson v. Stuckey. In Sayres, the plaintiffs claimed that they had been guaranteed continued employment with the defendant Cablentertainment orally. The issue of the existence of such an oral contract and the breach of such an oral contract were both submitted to a jury, and the jury found for the plaintiffs. Defendant Cablentertainment moved for a new trial, which was denied by the trial court. On appeal, the Supreme Court of Appeals reversed holding that the Court erred in failing to first determine the existence of an oral contract pursuant to clear and convincing evidence before submitting the case to a jury. After quoting that portion of *Thompson v. Stuckey* which held that "there should be clear and convincing evidence that the contract in fact exists before the court submits the claim to a jury", the Supreme Court of Appeals went on to hold:

> "Accordingly, because of the Appellees was in fact still employed by Cablentertainment one year following the buyout, this Court's ruling in *Thompson required the trial court to first determine* the existence of an employment contract pursuant to the clear and convincing evidentiary standard before submitting the case to the jury. Given our analysis in Section I of this decision, this *case should never have gone to the jury*

> because the appellees failed to prove by clear and convincing evidence the existence of any contract of employment." (emphasis added) 425 S.E.2d 226, 231.

Of course, there is a very good reason why the Court in the case at bar hesitated in even finding that a jury could possibly conclude from the evidence the existence of an oral contract, much less finding that there was clear and convincing evidence of such an oral contract. It's clear from the evidence presented by the Plaintiff that there was virtually *no evidence* of an oral contract other than the testimony of Dick Goff, which was contradicted by many of the Plaintiff's own witnesses, in addition to the fact that he was repeatedly impeached by the inconsistency between his trial testimony and his earlier deposition testimony.

In the absence of clear and convincing evidence of any oral contract, the Court should never have submitted the case to the jury on the oral contract theory. In any event, under *Thompson v. Stuckey* and *Sayres v. Bauman,* the court was required to "first determine the existence of (the) contract pursuant to the clear and convincing evidentiary standard before submitting the case to the jury," and that simply wasn't done. Accordingly, the Court should set aside the jury verdict and grant a new trial.

2. <u>The Court erred in failing to grant Defendants' Motion for Judgment as a matter of law as to Plaintiff's theory of fraud, absent proof of fraud and fraud damages.</u>

The essential elements of an action for fraud are well settled in West Virginia:

> "The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. Syl. Pt. 1, *Lengyel v. Lint,* 167 W.Va. 272, 280 S.E.2d 66 (1981). Syl. Pt. 2, *Muzelak v. King Chevrolet, Inc.,* 179 W.Va. 340, 368 S.E.2d 710 (1988)." Syl. Pt. 2, *Bowling v. Ansted Chrysler-Plymouth-Dodge,* 188 W.Va. 468, 425 S.E.2d 144 (1992).

The Supreme Court of Appeals has repeatedly stated that all of these elements must be proved by clear and convincing evidence. *Bowling v. Ansted Chrysler-Plymouth-Dodge,* 188 W.Va. 468, 425 S.E.2d 144, 148.

In the case at bar, Plaintiff failed to prove any of these elements by clear and convincing evidence or otherwise, including, particularly, but without limitation, that Plaintiff was damaged because it relied on a fraudulent act of the Defendant.

To begin with, the act alleged in the Complaint to constitute fraud was the promise that Defendant would hire Plaintiff Radec to mine the Drautz property.[1] The Complaint further alleges that this "promise and agreement" was made with the intention of falsely inducing Plaintiff Radec to mine Radec #5, an unprofitable tract of coal (Paragraph 6 of the Complaint). Finally, the Complaint alleges that Plaintiff Radec reasonably relied upon these "representations" of Defendant and did in fact mine Radec #5 at a financial loss" (Paragraph 8 of the Complaint).

However, none of this adds up to fraud under West Virginia law, because:

> "Fraud cannot be predicated on a promise not performed. To make it available there must be a false assertion in regard to some *existing* matter by which a party is induced to part with his money or his property." Syl. Pt. 3, *Croston v. Emax Oil Co., a Virginia corp.,* 195 W.Va. 86, 464 S.E.2d 728 (1995). (emphasis in the original)

---

[1] Paragraph 5 of Plaintiff's Complaint reads:

> "To induce plaintiff to enter into the contract to mine Radec # 5, defendants offered as an incentive to hire the plaintiff to mine another, more financially profitable tract of coal, located in the Laurel Creek area of Mingo County, West Virginia, one mile below the Dingess Tunnel, commonly known as Drautz property, when Radec #5 was completed."

To the same effect, *see, Janssen v. Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952). Syl. Pt. 4. The promise allegedly made by Defendant Marrowbone, i.e., that Marrowbone would hire Plaintiff Radec to mine the Drautz property, is clearly promissory in nature, and does not involve a false assertion in regard to any *existing* fact.

The Supreme Court of Appeals addressed similar facts in *Croston, supra*. in which it was alleged that defendant Emax had promised that the plaintiff's property would be unitized or pooled with other property. The Court concluded that in the absence of evidence showing that defendant Emax intended not to fulfill its promise at the time the promise was made, there was no proof of fraud:

> "It appears to this Court that the ground upon which the appellants predicate their claim of fraud is the alleged assertion by Emax that the appellant's property would be unitized or 'pooled' with the Mayle property. That is, on an assertion or statement of opinion relating to a future event. Ordinarily, as previously stated, such an expression of intention or opinion will not serve as the predicate of fraud unless the party claiming fraud shows the nonexistence of the intention to fulfill the promise or predicted act at the time the promise or predicted act was made." 464 S.E.2d at 732.

The Court went on to conclude that the evidence in that action failed to show that the defendant did not intend to carry out its promise at the time it was made, and, therefore, there was no proof of fraud:

> "In this Court's view, the evidence fails to show that Emax did not intend to carry out its representation to pool at the time the appellant's lease was negotiated. To the contrary, the evidence rather clearly indicates that the expression of intention was a truthful expression of intention, but that subsequent events rendered the execution of the intention inappropriate." 464 S.E.2d at 733.

In the case at bar, there was no evidence introduced to the effect that Marrowbone or its alleged agents never intended

to let Radec mine the Drautz property. The only evidence introduced was to the effect that such a promise was made. There was no evidence that the Defendant did not intend to perform the promise at the time it was made. Absent such evidence, there was no proof of the first element of fraud. There simply was no allegation or proof of any misrepresentation of an existing fact. What the Plaintiff alleged and attempted to prove was in reality an oral contract and not fraud at all.

Further, there was absolutely no proof of the third essential element of fraud, i.e., proof that the Plaintiff was damaged because it relied on false representations of existing fact. Although Plaintiff Radec alleged in its Complaint that it mined Radec No. 5 at a financial loss, in reliance on Defendant's alleged promise of the Drautz property, in fact, Plaintiff offered absolutely no evidence of a financial loss in Radec No. 5. Plaintiff Radec's bookkeeper, Kay Parsley, admitted that she didn't know whether Radec had lost money in Radec No. 5 or not. No other witness, including Radec's accounting expert, opined as to a loss in Radec No. 5. Radec's accounting expert admittedly had done no work with respect to the tax years in which Radec No. 5 was mined. His opinions related solely to the tax year which ended June 30, 1994 (before the mining of Radec No. 5), and the thrust of his opinions related to the alleged profitability of mining the Drautz property.

When this issue was raised by Defendant in its Motion For Judgement as a Matter of Law at the close of the Plaintiff's case, Plaintiff's counsel did not contest the fact that there was no evidence presented as to a loss in Radec No. 5, but, instead argued that the $89,629.89 allegedly incurred as additional rehabilitation costs constituted fraud damages. It is clear, however, that the costs incurred by Radec in rehabilitating Radec No. 5 couldn't possibly have been incurred in reliance on the alleged promise of Drautz, because, as Dick Goff testified, that promise was first made in "early summer" 1995, i.e., sometime after June 20, 1995. Whereas, the rehabilitation expenses for which Radec seeks

reimbursement were started in April of 1995. Significantly, Radec did not offer evidence as to when the alleged additional rehabilitation costs were incurred, but instead submitted only Plaintiff's Exhibit 95 showing a total additional amount due of $89,629.89 (which was, of course, the precise amount awarded by the jury as compensatory damages). In the absence of proof that the $89,629.89 was incurred after the alleged promise of Drautz was allegedly made in the "early summer", there was no proof of the third essential element of fraud, i.e., damages incurred in reliance on the misrepresentation of an existing fact.

Further, as discussed above, since there was no misrepresentation of an existing fact, but only the promise of a future opportunity, there could not possibly have been any damages incurred in reliance on the misrepresentation of an existing fact.

Further, as discussed below, the parties entered into an oral agreement with respect to the compensation of Radec for the rehabilitation work performed in Radec No. 5, and Radec received payment in full under that contract, and having received payment in full there are, of course, no amounts due Radec and, therefore, no damages. Since Radec was paid in full for the rehabilitation work in accordance with its own invoicing, its position is no worse than it would have been had the alleged fraud not been committed, and, therefore, there is no damage, and absent damage, no fraud. See, Michies Jurisprudence, Fraud and Deceit, Section 28:

> "It is an ancient rule of the common law that in order for a party to be entitled to a right of action for fraud, it is necessary for it to be coupled with damage. Negatively framed, the rule as to what constitutes damage, in any case, may broadly be stated to be that there is no damage where the position of the complaining party is no worse than it would be had the alleged fraud not been committed."

3. The Court erred in improperly instructing the jury as to punitive damages.

Over Defendant's objection, the Court instructed the jury that they could return a verdict for punitive damages. The instructions given were clearly improper under West Virginia law. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), Syl. Pt. 3 held:

> "3. When the trial court instructs the jury on punitive damages, the court should, *at a minimum,* carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or coverup his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant." (emphasis added)

In actual fact, the Court's charge with respect to punitive damages, objected to by Defendant, included *none* of these five essential elements, and, therefore, the jury was improperly instructed as to punitive damages. The Supreme Court of Appeals has continued to consistently require punitive damage instructions to include these five elements. *See, TXO Production v. Alliance Resources,* 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd 113 S.Ct. 2711 (1993); *Alkire v. First Nat. Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122 (1996); *Given v. Field,* 199 W.Va. 394, 484 S.E.2d 647 (1997); and Vandevender v. Sheetz, Inc., 200 W.Va. 591, 490 S.E.2d 678 (1997), U.S. Cert. Denied. In each of these cases, the Supreme Court of Appeals emphasized that all five of the essential ingredients of adequate punitive damage instructions must be included in the instructions. The absence of these instructions in the case at bar, including, particularly, the failure of the Court to instruct the jury that "As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages," very arguably, accounts for the jury's decision to return a punitive damage award which is over seventeen times the amount of the compensatory damage award.

It should be noted that *Garnes* and the subsequent decisions cited above, require that the trial court, following the return of a punitive damage award, must make a "meaningful and adequate review" of the award, which includes all five of the factors which must be included in proper punitive damages instructions to the jury, as well as four additional factors:

> "Following the return of a punitive damages award, *Garnes* requires the trial court to make a 'meaningful and adequate review' of the award.
>
> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following

additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlement when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Syl. Pt. 4, in part, *Garnes,* 186 W.Va. at 659, 413 S.E.2d at 900."

Vandevender v. Sheetz, Inc., 200 W.Va. 591, 490 S.E.2d 678, 686 (1997), U.S. cert den. 139 L.E.2d 871.

In accordance with the *Garnes'* requirement that the trial court make a "meaningful and adequate" review of any punitive damage award, Defendant Marrowbone has filed a separate motion for review of the punitive damage award in this action. However, regardless of how the Court rules on that motion, the fact remains that the punitive damage instructions given to the jury in this action were entirely inadequate in that none of the five required Garnes' elements were included in the instructions, and, therefore, the punitive damage award returned by the jury must be set aside and the Defendant granted a new trial.

4. The Court erred in failing to grant Defendants' Motion In Limine to prohibit Plaintiff from introducing, for punitive damages purposes, documents showing gross income or gross revenues of Defendant.

By motion in limine, Defendant moved the Court to exclude from evidence opening statements and closing arguments, any and all reference to Marrowbone's income and/or profitability. Further, Defendant specifically objected to Plaintiff's Exhibit 27, because of the inclusion therein of a document entitled "Marrowbone Development Company Historical Financial Statistics", which shows gross

sales revenue in excess of $800,000,000.00 over a six year time period. Other similar documents were also objected to and also admitted into evidence. The "Marrowbone Development Company Historical Financial Statistics" was blown up by Plaintiff and showed to the jury repeatedly. That document, and others like it, laid the foundation for Plaintiff's counsel's closing argument in which his plea for punitive damages was based, in part at least, on the fact that Defendant Marrowbone had "$800,000,000.00 in revenue or income" or words to that effect.

Although under the *Garnes'* analysis, "the financial position of the defendant is relevant", the document showing gross revenues over a six year time period in no way reflects the "financial position" of the defendant. Corporations can have enormous gross revenues and no net profit and no net assets. Gross revenues have nothing whatever to do with "financial position," and Radec itself is a perfect example of that. For several years it had gross revenues in the range of $7,000,000.00, but little or no net profits. Plaintiff's argument to the jury that Marrowbone had $800,000,000.00 in revenue or income necessarily created an entirely false and prejudicial impression as to the "financial position" of Marrowbone, and it was error to admit the gross revenue and/or sales documents into evidence. These documents, as pointed out by Defendant at the time the objections were made, were not relevant to any legitimate issue in the action.

See, also, Roberts v. Stevens Clinic Hospital, Inc., 176 W.Va. 492, 345 S.E.2d 791 (1986) in which the Supreme Court of Appeals granted a remittitur of damages from $10,000,000.00 to $3,000,000.00, because plaintiff's counsel had improperly argued the measure of damages in closing argument. This remittitur was granted, notwithstanding the fact that defense counsel did not object to the objectionable portion of plaintiff's counsel's closing argument. The court noted that under those circumstances no objection was required or would serve any useful purpose:

> "We point out that there was no objection to the argument, but can anyone seriously contend that a timely objection and a 'curative' instruction would have changed the outcome in this case? In the roughly seven seconds available to counsel to make the strategic decision whether to object, it probably dawned on counsel that an objection and 'curative' instruction would serve only to reinforce plaintiff's counsel's point." 345 S.E.2d 791, 799, footnote 5.

In the case at bar, Defendant's counsel did not object at the time of Plaintiff's counsel's closing argument, but Defendant did repeatedly object to the admission of the documentary evidence that made the erroneous argument possible. The Court had been given adequate opportunity to rule on the objectionable nature of gross revenue/income statistics and argument based thereon.

5. The Court erred in instructing the jury as to punitive damages, absent evidence of gross fraud, malice, oppression, or wanton, wilful or reckless conduct or criminal indifference to civil obligations affecting the rights of others.

It is now well settled in West Virginia jurisprudence that punitive damages can only be awarded where there is a showing of "gross fraud, malice, oppression, or wanton, wilful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." In that regard, see the recent decision of the Supreme Court of Appeals in *Alkire v. First Nat. Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122, 129 (1996):

> "The type of conduct which gives rise to punitive damages in West Virginia was first formulated in *Mayer v. Frobe,* 40 W.Va. 246, 22 S.E. 58 (1895), where the court stated in Syl. Pt. 4:
>
> > In actions of tort, where gross fraud, malice, oppression, or wanton, wilful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

> Although there are tempting shorthand phrases to characterize the type of conduct which warrants punitive damage consideration, for example, 'conscious indifference' (citation omitted), 'reckless, wilful and wanton' (citation omitted), 'particularly egregious' (citation omitted), we are still committed to the traditional rule announced in Mayer and cited with approval in a number of subsequent cases."

In the case at bar, there simply was no showing of "gross" fraud or, in fact, any fraud at all as discussed above. There was testimony as to an alleged promise of a future contract, but there was no testimony or evidence of a misrepresentation of any existing fact and, therefore, no fraud at all and certainly no "gross" fraud. Likewise, there was no evidence of malice, oppression or wanton, wilful or reckless conduct or criminal indifference to civil obligations affecting the rights of others.

In the recent case of *Shrewsberry v. Aztec Sales & Service Co.,* 191 W.Va. 312, 445 S.E.2d 253 (1994), the Supreme Court of Appeals upheld the decision of the trial court to prohibit the jury from considering punitive damages notwithstanding the fact that the evidence in that case showed that the defendant had knowingly and deliberately repossessed a machine which had been paid for in full, and held by Defendant in order to force the plaintiff to pay for a different piece of equipment. If that kind of deliberate intentional wrong doesn't warrant jury consideration of punitive damages, then clearly none of the evidence in the case at bar would warrant such consideration.

Likewise, in *Stafford v. Rocky Hollow Coal Company,* 198 W.Va. 593, 482 S.E.2d 210 (1996), the Supreme Court of Appeals affirmed the trial court's finding that the evidence was insufficient to sustain an award of punitive damages, notwithstanding the allegations that the defendants had intentionally and recklessly engaged in extreme and outrageous conduct which had caused the plaintiff severe emotional distress. In addition to there being no evidence of "gross" fraud, etc. in the case at bar, there clearly was

no such evidence with respect to Defendant's failure to pay the alleged additional rehabilitation costs in the amount of $89,629.89. Defendant was never asked to pay those alleged additional expenses until the trial of this action. There was no allegation with respect to rehabilitation costs in the Complaint, and no amendment of the Complaint prior to or at the trial.

6. The jury's verdict should be set aside or the Court should grant a remittitur with respect to punitive damages in that the punitive damages awarded don't bear a reasonable relationship to the actual compensatory damages awarded.

It was held in *Garnes, supra,* and all subsequent decisions:

> "As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." Syl. Pt. 3, *Garnes, supra.*

Later, in *TXO Production v. Alliance Resources,* 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd 113 S.Ct. 2711 (1993) the Supreme Court of Appeals fleshed out the requirement that punitive damages must bear a reasonable relationship to compensatory damages. Specifically, the Court concluded that where the defendant has acted with "no actual intention to cause harm," the "outer limit" of the ratio of punitive damages to compensatory damages is roughly five to one:

> "The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional." Syl. Pt. 15, *TXO Production v. Alliance Resources, supra.*

In *Vandevender v. Sheetz, Inc.,* 200 W.Va. 591, 490 S.E.2d 678, 691 (1997), U.S. cert denied, 139 L.E.2d 871, the Su-

preme Court of Appeals stated:

> In Syl. Pt. fifteen of *TXO* we distinguished between conduct that demonstrates 'extreme negligence or wanton disregard' and conduct that evinces an 'actual intention to cause harm.' 187 W.Va. at 461, 419 S.E.2d at 874. The significance of that distinction was our formulation of an outer limit of five to one with regard to the ratio of punitives to compensatory damages in cases that fall into the first category – that is, those cases in which the defendant's conduct registers on the scale of extreme negligence or wanton disregard. *Id.* Only in those cases where the defendant can be shown to have actually intended to cause harm is the ratio of punitives to compensatories permitted to climb higher without 'raising a suspicious judicial eyebrow.' *TXO,* 509 U.S. at 481, 113 S.Ct. at 2732 (O'Conner, J. dissenting)."

In the case at bar, there was absolutely no evidence presented that the defendant "actually intended to cause harm" to Radec. Even if all of Radec's contentions are accepted as true, there is no evidence of any actual intent to cause harm. Therefore, the outer limit of a punitive damage award in the case at bar would be five times the compensatory damage award. In short, the maximum punitive damages in the case at bar would be $448,149.45, and the portion of the punitive damages actually awarded in excess of that amount must be remitted. As the supreme Court of Appeals held in *TXO Production v. Alliance Resources,* 187 W.Va. 457, 419 S.E.2d 870 (1992):

> "Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syl.

Pt. 4, *Garnes v. Fleming Landfill,* 186 W.Va. 656, 413 S.E.2d 897 (1991)." Syl. Pt. 14.

Therefore, remittitur has been identified by the Supreme Court of Appeals as the appropriate remedy where downward adjustment of punitive damage award is required. As discussed above, in the case at bar, the jury was never instructed as it should have been that as a matter of fundamental fairness punitive damages must bear a reasonable relationship to compensatory damages. Absent proper instruction of the jury and absent any evidence whatsoever of actual intent to harm on the part of Defendant, a remittitur to a five to one ratio is required.

7. The Court erred in failing to grant Defendant's Motion For Judgment as a Matter of Law as to Plaintiff's claim for rehabilitation expenses, which claim was barred by the doctrine of accord and satisfaction.

Plaintiff claimed an additional $89,629.89 in rehabilitation expenses which allegedly had never been reimbursed by Marrowbone to Radec. The facts with regard to this claim were undisputed. According to Plaintiff's witnesses, an oral agreement was entered into between Radec and Marrowbone that Marrowbone would reimburse Radec's rehabilitation expenses. Subsequently, after rehabilitation expenses were incurred by Radec, it submitted an invoice to Marrowbone for the initial rehabilitation expenses. At that time, according to Plaintiff's evidence, Marrowbone contested the amount of the invoice, and, in effect, offered to pay a lesser amount to Radec. Radec accepted this offer, and prepared a revised invoice which it submitted to Marrowbone and Marrowbone paid in full. According to Radec's evidence, all subsequent invoices for rehabilitation costs were calculated in the same manner, although Kay Parsley, who prepared the invoices, was unable to tell the jury what criteria she used in determining what expenses were within the agreement of the parties.

The elements of an accord and satisfaction are set forth in *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755, 759 (1994):

> "The plaintiff asserts that a genuine issue of material fact exists as to whether an accord and satisfaction was reached. In Syllabus Point 1 of *Charleston Urban Renewal Authority v. Stanley,* 176 W.Va. 591, 346 S.E.2d 740 (1985), we set forth the following elements of accord and satisfaction:
>
> > 'To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) Consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all.'"

The Court then went on to hold that contrary to the plaintiff's contention that there was a genuine issue of material fact as to whether an accord and satisfaction had been reached in that action, there was no such genuine issue and that it was clear from undisputed evidence that an accord and satisfaction had been reached:

> "It is undisputed that the first element was met. Consideration was paid by the settlement check. However, the plaintiff argues that nevertheless there exist genuine issues of fact as to the remaining two elements. We disagree." 451 S.E.2d 755, 759.

In the case at bar, the facts, as noted above, are undisputed, and all three elements of an accord and satisfaction exist. Clearly, there was consideration in the form of the payments made by Marrowbone. It's undisputed that the payments offered by Marrowbone were to be in full settlement of the disputed claims, and it is undisputed that Radec accepted the payments made by Marrowbone with the knowledge that Marrowbone was offering these payments only upon condition that Radec would accept the payments in full satisfaction of the rehabilitation costs. Thus, any claim with respect to the $89,629.89 is barred by the doctrine of accord and satisfaction. In that regard, *see, Summers v. Summers,* 186 W.Va. 635, 413 S.E.2d 692, 698 (1991):

> "By definition an accord and satisfaction requires full performance of the terms of the compromise. Once the parties have fully complied with the terms of the compromise agreement, the doctrine is invoked and acts as a bar to all actions upon the same agreement."

Therefore, the jury should not have been permitted to return a verdict for the $89,629.89, and since that was the only amount awarded as compensatory damages, the award for punitive damages must also be set aside. A jury may not return an award for punitive damages without compensatory damages:

> "Therefore, we overrule Syllabus Point 3 of *Wells* to the extent that it stands for the proposition that a jury may return an award of punitive damages without finding any compensatory damages." *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897, 908 (1992).

8. The Court erred in failing to grant Defendant's Motion In Limine to prohibit the Plaintiff from introducing evidence as to union/nonunion issues which were irrelevant and prejudicial to Defendant.

The Court's failure to grant Defendant's Motion In Limine to prohibit the introduction of evidence as to union/nonunion issues resulted in the introduction by Plaintiff of prejudicial and irrelevant evidence with respect to an alleged "plot" by Marrowbone to do away with its union employees. More specifically, Plaintiff introduced evidence to the effect (and argued) that the documentary evidence showed that Marrowbone over a period of time intended to phase out its own union production of coal and intended to transfer coal production to a nonunion company named Heritage. This evidence had nothing to do with any legitimate issue in the action. In no way did this evidence tend to support Plaintiff's theory of an oral contract to mine the Drautz property. The sole and only purpose for introducing the evidence was to prejudice the jury against Marrowbone, and it appears from the outrageously large punitive damage award that this ploy succeeded.

Under Rule 402 of the West Virginia Rules of Evidence, "Evidence which is not relevant is not admissible." And, under Rule 403, even where evidence is relevant, such evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The union/nonunion evidence should have been excluded under either Rule 402 or 403, or both.

9. The Court should grant a new trial in that Plaintiff improperly and deliberately introduced testimony as to past criminal activity of Marrowbone officials, in clear violation of the Court's ruling sustaining Defendant's Motion In Limine to prohibit such testimony.

Defendant Marrowbone filed a Motion In Limine to exclude from evidence, opening statements and closing arguments, all references to kick backs, in-house corruption, criminal charges, and/or similar matters involving past or present Marrowbone employees. The Court properly granted this Motion In Limine. Notwithstanding that ruling, Plaintiff's principal manager and witness Dick Goff blurted out, during cross examination, testimony to the effect that certain Marrowbone officials had been accused of criminal activity, etc. No question was posed by defense counsel which should have or reasonably might have elicited this testimony. This was a deliberate effort on the part of Plaintiff to prejudice the thinking of the jury. As the Supreme Court of Appeals pointed out in *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 799 (footnote 5) (1986), a "curative" instruction with respect to this matter "would serve only to reinforce plaintiff's counsel's point." The issue had been properly addressed prior to the trial, and the Court had properly ruled that Plaintiff was not to mention the old and entirely irrelevant criminal charges involving Marrowbone officials. There's only one meaningful way to "cure" this kind of deliberate violation of the Court's order, and that is to grant a new trial.

10. The Court erred in instructing the jury as to constructive fraud.

At the time instructions were argued in the case at bar, Defendant objected to the Court's proposed instructions as to constructive fraud. It was pointed out at that time that the Complaint in this action didn't allege constructive fraud, and, furthermore, the Plaintiff introduced no proof of constructive fraud.

Constructive fraud was defined by the Supreme Court of Appeals in *Stanley v. Sewell Coal Co.,* 169 W.Va. 72, 285 S.E.2d 679, 683 (1982):

> "Constructive fraud is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. (Citations omitted).
>
> Perhaps the best definition of constructive fraud is that it exists in cases in which conduct, although not actually fraudulent, ought to be so treated, that is, in which conduct is a constructive or *quasi fraud,* which has all the actual consequences and legal effects of actual fraud. (Citation omitted.) Constructive fraud does not require proof of fraudulent intent. The law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence, both public and private. (Citation omitted). In this respect, constructive fraud closely parallels the wrongful discharge in *Harless,* which contravened a substantial public policy principle."

Subsequent cases have continued to apply this definition. *See, Cordial v. Ernst & Young,* 199 W.Va. 119, 483 S.E.2d 248, 259 (1996) and *Wilt v. State Auto Mut. Ins. Co.,* 203 W.Va. 165, 506 S.E.2d 608, 612 (1998).

In *Cordial v. Ernst & Young, supra,* the Supreme Court of Appeals elaborated on its earlier definition by pointing out that constructive fraud is generally reserved for those cases where a fiduciary relationship exists between the

parties, or the fraud violates an important public policy concern:

> "With respect to the bases for constructive fraud in former equity actions we note that in *Miller v. Huntington & Ohio Bridge Co.,* 123 W.Va. 320, 15 S.E.2d 687 (1941), this court stated, with regard to constructive fraud, that '(t)he term is made to include violations of public policy or public rights or transactions affected by illegal conduct of any kind. (Citation omitted). More recently, the United States Fourth Circuit Court of Appeals, citing *Miller,* explained that 'constructive fraud is generally reserved for those cases where a fiduciary relationship exists between the parties or the fraud violates an important public policy concern.'(Citation omitted)." 483 S.E.2d 248, 260.

In the case at bar, there was no allegation of any fiduciary relationship between the parties, and there was no allegation of any important public policy concern. Likewise, there was no allegation of any violation of public policy or public rights or transactions. Also, there was no proof offered at trial of any of these matters. The only allegation in the Complaint was an allegation of actual fraud, and, as discussed above, in fact, there was no proof of even actual fraud and no suggestion even of constructive fraud.

Under these circumstances, the Court should have sustained the objection of Defendant with respect to the constructive fraud instructions, which were read to the jury. The constructive fraud instructions improperly given by the Court, included the statement that "It is not indispensable to a recovery that the Defendant actually knew his representations were false." Thus, the jury was allowed to find constructive fraud absent any actual fraudulent intent on the part of the Defendant. Clearly, this was error and warrants a new trial.

Respectfully Submitted,

Mountaineer Coal Development Company
d/b/a Marrowbone Development Company

/s/ Richard J. Bolen

By Counsel

Richard J. Bolen - WV State Bar ID No. 392
Melissa A. Dodd - WV State Bar ID No. 7440
Robert R. Waters - WV State Bar ID No. 7627
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

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No. 00-1608

In The

Supreme Court of the United States

MOUNTAINEER COAL DEVELOPMENT COMPANY,
d/b/a Marrowbone Development Company,
a West Virginia corporation,

Petitioner,

v.

RADEC, INC., a West Virginia corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

ROBERT ALLEN TAYLOR
Counsel of Record

MASTERS & TAYLOR, L.C.
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S OBJECTION TO CONSIDERATION OF QUESTION OF WHETHER THERE WAS A DENIAL OF DUE PROCESS BASED UPON AN INADEQUATE INSTRUCTION ON PUNITIVE DAMAGES

Petitioner Marrowbone bases its argument that it was denied due process of law on the absence of a *Garnes* instruction that it fought to keep out. Marrowbone failed to offer a *Garnes* instruction to the court, failed to object to the fact that the *Garnes* factors were not in the punitive damages section of the court's proposed charge, and *specifically objected* to the jury being instructed on the *Garnes* factors when Respondent Radec offered such an instruction. Therefore, Radec objects to consideration of the question on appeal as to whether Marrowbone was denied due process of law due to the lack of adequate constraints on the punitive damages award.

More specifically, no instruction on punitive damages was offered at any point by Marrowbone. The issue of a punitive damage instruction first arose when the trial court gave the parties its proposed charge to review for objections. The charge contained language regarding punitive damages, but did not list the five factors suggested to be given in the case of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Marrowbone objected to the punitive damages portion of the charge, not because of the absence of the *Garnes* factors, but simply because a punitive damages instruction was being given at all. (Resp. App. 1). The court overruled the objection, and made it clear to the parties that because Radec's allegations of fraud were supported by the evidence, the jury would be instructed on punitive damages.

At that point, Marrowbone did not make any further objection to the substance of the charge.

The issue of punitive damages instructions arose again when the parties submitted instructions in addition to the court's charge. Radec submitted Instruction No. 40, a *Garnes* instruction. (Resp. App. 9-11). Marrowbone specifically objected to the *Garnes* instruction offered by Radec stating to the court, "You've covered punitives repeatedly in your charge." (Resp. App. 7). Marrowbone now argues that the failure to give this instruction resulted in a denial of due process due to a "lack of significant constraints."

Marrowbone raised the argument on appeal to the Supreme Court of Appeals of West Virginia. In refusing to address the issue, the court held that "[o]ur cases are clear in holding that '[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.' " (Pet. App. 10a) (citation omitted). The court further noted that, Marrowbone "cannot . . . be allowed to alter retroactively [its] trial strategy." (Pet. App. 10a) (internal quotations and citations omitted). The court agreed that Marrowbone had invited the error and had therefore, waived the issue for appeal.

For these very same reasons, Radec respectfully requests that Your Honorable Court also hold that Marrowbone has waived this issue and may not seek reversal based on that alledged error.

STATEMENT OF THE CASE

Radec, Inc., a contract miner, contracted to mine two mines for Marrowbone in 1991. Those mines later were renamed Radec No. 4 and Radec No. 5. At that time, Radec No. 4 consisted of an area that would take approximately a year and a half to mine. In early 1992, after Radec was already mining Radec No. 4, Marrowbone obtained additional coal reserves adjacent to the coal in the original No. 4 mine. The parties entered a verbal agreement for the additional mining.

The additional reserves caused Radec to be in the new No. 4 mine three years more than originally anticipated. As a result of the delay, the conditions in Radec No. 5 deteriorated drastically. In May of 1995, when Radec was ready to start Radec No. 5, it was clear that a considerable amount of money would have to be spent to rehabilitate it before any coal could be mined. The costs for this extensive rehabilitation work were not part of Radec's original contract on Radec No. 5.

Richard Goff, a member of the family that owned and operated Radec, Inc., realized that Radec would lose money due to costs and time for the extensive rehabilitation in Radec No. 5. Mr. Goff discussed this problem with Marrowbone officer, Howard Epperly. Marrowbone agreed to reimburse Radec its rehabilitation costs, but when Radec submitted its bill to Marrowbone, Marrowbone refused to pay the entire costs, indicating that only certain costs would be covered.

Richard Goff also told Howard Epperly that unless Marrowbone gave Radec another tract of coal to mine to offset expected losses in Radec No. 5, Radec would not be

able to mine Radec No. 5. Pursuant to the terms of the original written contract, Radec could have terminated its obligation to mine by giving thirty-days notice to Marrowbone.

Marrowbone agreed that Radec No. 5 was a losing proposition. Marrowbone also knew that they would have to pay royalties to the landowners for any unmined coal in Radec No. 5. To entice Radec to stay and mine Radec No. 5, Marrowbone offered Radec another seam of coal, the Drautz property. Marrowbone represented that this would be a very profitable mine based upon their studies of the coal. Marrowbone employees took Radec to the property and mapped out with Radec how the mine would be set up; told Radec over and over again that they were getting the permit ready on the property so that Radec could start mining; agreed on a price for Radec to mine; and showed Radec development maps for the property. It is true that Marrowbone was preparing the permit for the Drautz property, but it was also deceptive. Marrowbone was preparing the Drautz permit for mining by a Marrowbone company, not for mining by Radec. Despite numerous discussions over a year and a half between Radec and Marrowbone regarding the Drautz property, Marrowbone did not ever inform Radec that the property was being prepared for another company to mine.

Based upon Marrowbone's deceitful representations that Radec would soon be mining the Drautz property, Radec continued mining and losing money in Radec No. 5. Radec was in such a need for cash to continue mining, that it had to obtain a loan from Marrowbone's parent corporation. Marrowbone made certain it got the money

back by deducting the cost of the loan from Radec's mining recovery. Radec also refinanced all its equipment, but eventually lost the equipment because of its inability to make the loan payments. Radec's need for cash to continue operations in Radec No. 5 became so great that family members took personal loans, pay cuts, went without pay for six months so the employees could be paid, liquidated personal assets, and took loans against their homes. Radec incurred a total debt of $1.1 million dollars.

In September, 1996, just before Radec had finished mining Radec No. 5, Marrowbone's permitting supervisor told Richard Goff in confidence that Radec was not going to mine the Drautz property. Immediately after being told, Richard Goff and Jerry Goff went to Marrowbone's corporate office and confronted officers Larry Jones and Howard Epperly. For the first time Marrowbone denied its oral promises and agreement that Radec would mine the Drautz property. By then, Radec was in a state of financial ruin.

The history between these two companies provides evidence of how Marrowbone knew they could take advantage of Radec. The Goff family had done business with Marrowbone's parent companies on numerous occasions over a twenty year period. Many agreements reached by these two companies were done verbally, with a written embodiment of that agreement following at a later time. Often the written document memorializing the parties' oral contract would be signed after Radec had already started mining. There were also times that nothing written followed the oral contracts entered into by these two companies.

JURY AWARD

Radec alleged two causes of action in its complaint: fraud and breach of contract. Marrowbone raised an objection to instructing the jury on fraud, and was overruled by the court. Radec offered a verdict form that set forth Radec's causes of action separately. Petitioner objected, offering a general verdict form instead. Based upon the general verdict form submitted by Marrowbone, a verdict was returned for Radec in the amount of $89,629.89 in compensatory damages, and $1,541,638.00 in punitive damages. No special interrogatories were requested by Marrowbone.

Marrowbone objected to Radec's specific discovery requests for documents showing Marrowbone's net worth. In order to establish Marrowbone's financial position, Radec had to use data found within other discovery documents produced by Marrowbone. The evidence showed that Marrowbone had grossed over $800,000,000 in sales over a six year period. No evidence was offered by Marrowbone to rebut Radec's evidence.

POST-TRIAL PROCEEDINGS

Marrowbone raised nine issues in its post-trial motions, including a motion for a new trial based on the lack of the *Garnes* instruction, and also filed a motion for the court to have post-trial consideration of the nine *Garnes* factors. A hearing was held on all post-trial motions. Marrowbone was given an opportunity at that

hearing to offer evidence that would mitigate the punitive damages award pursuant to the four post-trial factors listed in *Garnes*. However, Marrowbone opted not to offer any such evidence. After the hearing, the trial court entered a twenty-one page Final Order. The court conducted an independent review of the evidence and found that based upon the fraudulent acts of Marrowbone, the absence of the *Garnes* instruction did not create error that warranted a new trial. In reaching this conclusion, the court specifically set out all nine of the *Garnes* factors and the evidence presented in relation to those factors. The court denied all of Marrowbone's post-trial motions regarding punitive damages finding that, "based upon the evidence of record, the jury's punitive damages award passes the scrutiny of a *Garnes* review." (Pet. App. 32a).

APPELLATE PROCEEDINGS

The Supreme Court of Appeals of West Virginia considered the excessiveness argument by Marrowbone in light of the *Garnes* factors as well. After its independent review of the evidence presented, the court agreed that a punitive damages award seventeen times greater than the compensatory damage award was warranted in this case. The court held in part:

> We agree with Radec that the evidence of Marrowbone's fraudulent conduct warranted the amount of punitive damages awarded in this case. It is clear from the evidence that Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5.

> Additionally, Marrowbone plainly knew it would benefit from Radec's work on Radec No. 5. In order to reap this benefit, Marrowbone deceived Radec into believing that it would be given the profitable Drautz property to mine after completing work on Radec No. 5. Marrowbone never intended to turn over the Drautz property to Radec. Marrowbone's actions were "evil" and self-serving.

(Pet. App. 12a-13a).

ARGUMENT

1. MARROWBONE'S ARGUMENTS THAT THE JURY, THE TRIAL COURT AND WV SUPREME COURT ERRED IN FINDING FRAUD AND EVIL INTENT BY MARROWBONE AND DAMAGES BY RADEC, SHOULD NOT BE CONSIDERED BY THIS COURT IN THAT THEY ARE BASED UPON CLAIMS OF ERRONEOUS FACTUAL FINDINGS

Marrowbone alleges in its Petition that the punitive damages award is unconstitutionally excessive since there was no evidence of fraud or evil intent and that Radec did not suffer any damages. However, the Supreme Court of Appeals of West Virginia made specific factual findings in its opinion that contradicts Marrowbone's claims. Marrowbone alleges that "there was no contention that Marrowbone misrepresented any existing fact." (Pet. Brief 10). However, the West Virginia Supreme Court found, "Howard Epperly promised to let Radec mine the Drautz property . . . [but] Marrowbone had never actually considered letting Radec mine the Drautz property." (Pet. App. 7a). Marrowbone argues that,

"Radec also failed to prove any damages resulting from the alleged fraud." (Pet. Brief 10). The court found, however, evidence supported Radec's position that, "Radec was financially ruined as a result of its reliance on Marrowbone's promise to allow Radec to mine the Drautz property. There was evidence that Radec incurred debts totaling $1.1 million dollars." (Pet. App. 7a). Marrowbone further claims in its Petition that "there has never been any contention in this action and no finding in the lower courts of 'concealment of evidence of improper motive,' " and that "[n]o such proof [of malice] exists in the record of this case." (Pet. Brief 11). However, the West Virginia Supreme Court found:

> Marrowbone knew Radec could not survive financially if it rehabilitated and mined Radec No. 5. Additionally, Marrowbone plainly knew it would benefit from Radec's work on Radec No. 5. In order to reap this benefit, Marrowbone deceived Radec into believing that it would be given the profitable Drautz property to mine after completing work on Radec No. 5. Marrowbone never intended to turn over the Drautz property to Radec. Marrowbone's actions were "evil" and self-serving.

(Pet. App. 13a).

Apparently, the reason this case has been presented to this Court is summed up in footnote 3 of Marrowbone's petition which states, "[A] number of the 'facts' upon which the majority's *per curiam* opinion relied in finding evidence of fraud are not facts at all and are not supported by a review of the record." A review of the record clearly negates Marrowbone's position. Regardless, however, Marrowbone fails to recognize that Rule 10

of the Rules of The United States Supreme Court provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . . " Accordingly, Radec respectfully submits that Marrowbone's petition should be denied in such respect.

2. PROCEDURAL SAFEGUARDS ARE IN PLACE IN WEST VIRGINIA, AND WERE FOLLOWED IN THIS CASE TO PROTECT DEFENDANTS AGAINST GROSSLY EXCESSIVE PUNITIVE DAMAGES AWARDS

a. The jury was instructed that it had to find actual malice before punitive damages could be awarded, and Marrowbone waived further instruction on punitive damages at the trial court level by objecting to the *Garnes* instruction.

The law of West Virginia allows for punitive damages "[w]here gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it. . . . " *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996). The court instructed that punitive damages could not be awarded for breach of contract, only for fraud. (Resp. App. 5-6). The jury was further instructed that even if Radec proved all the elements of fraud, Radec was required to prove malice, wanton, willful, or reckless conduct by clear and convincing evidence before punitive damages could be awarded. (Resp. App. 1-2, 6). As discussed above, further instruction on the *Garnes* factors

was objected to by Marrowbone, and, therefore, any error attributed to the lack of a *Garnes* instruction is waived. Syl. pt. 4, *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996).

b. A thorough and independent review was conducted by the trial court to assess whether the evidence warranted a punitive award, and the evidence was evaluated in light of the *Garnes* factors.

Syllabus Point 7 of *Alkire* provides that West Virginia's "punitive damages jurisprudence"

> includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

Syl. pt. 7, *Alkire v. First Nat'l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

The first mandatory review is conducted by the trial court. The trial court is instructed to review punitive damages "exclusively within the boundaries of Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992)." *Alkire*, 475 S.E.2d at syl. pt. 5. If the trial court fails to conduct an adequate review, the state Supreme Court will not consider the petition, but

will send the case back to the trial court for a thorough analysis of excessiveness. *Id.* at 131.

In its twenty-one page Final Order, the trial court's independent review of the evidence is clear. The order states:

> [T]he Court has undertaken the weighing of the evidence introduced at trial and has considered the credibility of the witnesses. The Court finds the verdict was consistent with the clear weight of the evidence and that the verdict was *not* based upon false evidence nor will the verdict result in a miscarriage of justice.

(Pet. App. 31a).

The trial court then laid out the *Garnes* factors and summarized the evidence in light of those factors. Based upon its review, the court found " 'clear and convincing' " evidence that Marrowbone "made promises to the Plaintiff with no intention of fulfilling those promises," and that the fraud damages suffered by Radec sufficiently supported the verdict returned in the case. (Pet. App. 31a).

The review by the trial court was met with approval by the Supreme Court of Appeals of West Virginia. As to Marrowbone's argument that it was denied due process based upon an inadequate review by the trial court, the Court held "[w]e disagree with Marrowbone's contention that the order fails to demonstrate a meaningful review. We find the order shows the trial court gave full consideration to the amount of the punitive damage award and the evidence adduced at trial." (Pet. App. 11a).

c. A review of a punitive damages award is mandatory by the Supreme Court of Appeals of West Virginia and upon its review found Marrowbone's conduct to be "evil and self-serving."

The second mandatory review of a punitive damages award is by the Supreme Court of Appeals of West Virginia. The state's highest court conducts an independent review of "the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*." *Alkire v. First Nat'l Bank of Parsons*, 475 S.E.2d 122, 130-131 (1996). Syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), states:

> Upon petition this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

The West Virginia Supreme Court fulfilled its duty of an independent review of the punitive damage award in this case. Under the guidance of the standard enunciated in syllabus point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the court reviewed the evidence and found proof that Marrowbone's conduct towards Radec was "evil and self-

serving." Based upon this intentional, reprehensible conduct, the court upheld the constitutionality of the $1.5 million punitive damages verdict. (Pet. App. 13a).

3. THE PUNITIVE DAMAGES AWARD IN THIS CASE IS NOT EXCESSIVE UNDER THE THREE GUIDEPOSTS IN *BMW V. GORE*

a. The actions of the Marrowbone were evil and self-serving showing a high degree of reprehensibility.

The first "guidepost" in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), is consideration of the degree of reprehensibility of the defendant's conduct. The West Virginia Supreme Court's decision in *TXO* held that in cases of extreme negligence that the outer limit of the ratio of punitive damages to compensatory damages is roughly five to one. However, that rough outer limit applies in cases where there is no actual intention to cause harm. *TXO*, 419 S.E.2d at syl. pt. 15. In the case of *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Court states that the concern in a punitive damages award is that "the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." As explained in *Gore*, " 'trickery and deceit' are more reprehensible than negligence." *Gore*, 517 U.S., at 575 (*quoting TXO*, 509 U.S., at 462, 113 S.Ct., at 2722).

Marrowbone's conduct in this case involved "trickery and deceit," but even went beyond, rising to the level of "evil and self-serving." Marrowbone was aware that

Radec was in a vulnerable financial position. Radec employees testified that they continuously made Marrowbone aware that they were losing money in Radec No. 5, and the reason they needed the Drautz property was to recover their losses. Marrowbone even loaned Radec money during their mining of No. 5. The loan payments were withheld from Radec's mining recovery. Even though Marrowbone knew all along that Radec would not be mining Drautz, and they knew that Radec was falling deeper and deeper into financial trouble, they continued to misrepresent to Radec that the Drautz property was being prepared for them. *Gore* holds that "[t]o be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Gore*, 517 U.S., at 575 (citation omitted). Marrowbone's motive was to get the coal mined in No. 5 so that Marrowbone would not lose money to the mineral owners for unmined coal.

Marrowbone's fraudulent conduct did not stop with false promises to Radec. Two of Marrowbone's witnesses testified at trial that the Drautz property was found not to be profitable to mine and so the permit for the Drautz property was never filed with the DEP. However, Radec's Exhibit 100, a certified copy of the filed application, proved that that permit was filed in 1996.[1] When one of the witnesses who testified that the permit was not filed

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[1] The filed permit was never disclosed by Marrowbone in discovery, even though all such documents were specifically requested, but was discovered just weeks before trial through an independent investigation by Radec's counsel.

was shown the filed application at trial bearing his notarized signature, he denied the signature was his. That permit was originally filed under the name of Marrowbone, but then changed to Heritage Corporation, a subsidiary of Marrowbone's parent corporation.

Unlike BMW's actions in *Gore* where this Court found "none of the aggravating factors associated with particularly reprehensible conduct," *Gore*, 517 U.S., at 559, and, "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," *Gore*, 517 U.S., at 579, Marrowbone's conduct was fraudulent and deliberately malicious, causing financial ruin to Radec. Marrowbone invited a high award of punitive damages through its "evil and self-serving" conduct.

b. The ratio of 17 to 1 punitive damages to compensatory damages is not excessive in light of the actual harm suffered by Radec and the potential harm that could result from Marrowbone's future fraudulent schemes.

The second inquiry under *Gore* is the ratio of the actual or potential harm to the plaintiff and the punitive damages award. *Gore*, 517 U.S., at 580. Instead of looking only at the dollar amount of the compensatory damage award, this Court confirmed on at least three occasions that "[t]he proper inquiry [of the ratio between compensatory and punitive damages] is ' "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." ' "

Gore, 517 U.S., at 581 (*quoting TXO*, 509 U.S., at 460 (*quoting Haslip*, 499 U.S., at 21)). The Court has made it clear that the numbers themselves that establish the ratio are not the controlling factors, stating "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Gore*, 517 U.S., at 582 (*citing TXO*, 509 U.S., at 458, 113 S.Ct., at 2720). The excessiveness inquiry with regard to the ratio is mostly dependant upon the specific facts of the case. *See, e.g. TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

The jury awarded Radec $89,000 in compensatory damages, an amount equal to the rehabilitation costs that Marrowbone refused to pay Radec. Radec's witnesses also testified that Radec and its family member owners went into debt of over a million dollars for taxes, accumulated bills to their creditors, and from having to refinance their equipment and their homes, all because of the time spent in Radec No. 5.

Radec's accounting expert, Drew Baldock testified as to the net income that Radec would have earned had they actually mined the Drautz property. Based upon the mining projections of mining expert Raymond Brainard, and the past accounting figures for Radec mining a similar block of coal, Mr. Baldock was able to calculate that Radec would have made a profit of .6806 cents a ton on the 2.2 million tons of coal in Drautz for a net profit of approximately 1.5 million dollars. These losses suffered

by Radec were different than an actual out-of-pocket expenditure, but more esoteric and harder for a jury to assess. The Court in *Gore* considered situations, such as the one presented in this case, where the actual damages are difficult to assess. The Court held that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, . . . the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S., at 583. Ironically, the punitive damages award was within less than $50,000 of the amount presented at trial for lost profits.

Gore also suggests that the excessiveness inquiry includes "identification of the state interests that a punitive award is designed to serve." *Gore*, 517 U.S., at 568. The Court found in *TXO*, 509 U.S. 443 (1993), that there is an interest in deterring harm to future victims that could result if defendant's deceitful conduct continued. Contract miners in West Virginia generally have no ownership or leasehold in the lands that they mine. Radec testified that contract miners are typically used by the larger mining companies to mine the more difficult seams of coal that would not be cost effective for the larger companies to mine. The contract miners are traditionally at the mercy of the larger companies. The state has a legitimate interest in deterring Marrowbone from taking advantage of and defrauding other contract miners by engaging in "similar future behavior." *Id.* at 460-461.

When considering all damages to Radec caused by Marrowbone's actions, and the potential damages caused to other West Virginia contract mining companies if Marrowbone were not punished and deterred from future

similar behavior, the ratio between the punitive and compensatory damages is actually less than two to one. Therefore, the punitive damage award in this case is not an indication of excessiveness.

c. West Virginia law against criminal fraud allows for imprisonment up to ten years and more severe sanctions have been approved in West Virginia and by this Court for comparable misconduct in other cases.

The third guidepost to be considered in determining whether the punitive damages award violates the due process clause is a comparison with "civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S., at 583. Under West Virginia Code § 61-3-24(d) [1994], Marrowbone's conduct was criminal. Section 61-3-24(d) provides in part that, "If a person, firm or corporation obtains labor, services or any other such thing of value from another by any false pretense, token or representation, with intent to defraud, the . . . corporation is guilty of theft of services." The statute goes on to say that if the value of the services fraudulently obtained is in excess of $1,000, the violator is guilty of a felony, punishable by imprisonment for up to ten years.

In this case, the losses the jury found that were directly attributable to Marrowbone were awarded in an amount of $89,000, substantially in excess of $1,000. The million dollar debt incurred by Radec as a result of the time spent in Radec No. 5, however, is a reasonably foreseeable loss caused by Marrowbone's fraudulent acts. Incarceration for up to ten years is as severe, if not more

severe than a $1.5 million punitive damages award against a company earning over $800,000,000.00 in gross sales.[2]

The conduct of Marrowbone in this case is not substantially different from that of TXO towards Alliance Resources Corp. In *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), TXO began its endeavor to obtain oil and gas from the Blevins tract as a legitimate business deal, just as Marrowbone did when it entered into the contracts with Radec. However, when the opportunity presented itself for TXO to save itself from losing profits in royalty payments to Alliance, even if the opportunity was through illegal means, TXO set out on a scheme of trickery and deceit to defraud Alliance. Marrowbone saw a similar opportunity. When Radec informed Marrowbone that Mine No. 5 was no longer economical for Radec to mine, Marrowbone recognized that money would be lost to the mineral owners for the unmined coal. At that point Marrowbone lured Radec into mining the coal at a loss through deceit and false promises.

A punitive damages verdict over 500 times greater than the compensatory damages verdict was not found to

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[2] Through discovery Radec obtained figures representing Marrowbone's gross profit from sales of coal from a six year period which included the time period in which Radec was losing money in Radec No. 5. At trial, Marrowbone had an opportunity to rebut the evidence that Marrowbone had grossed over $800,000,000.00 in coal sales, however, they chose not to do so.

be constitutionally excessive in light of TXO's deliberate, malicious acts. Based upon the criminal penalties permitted by law in West Virginia for Marrowbone's conduct and the civil sanctions approved of in this state for comparable civil conduct, the verdict awarded against Marrowbone under all the circumstances in this case is not excessive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

ROBERT ALLEN TAYLOR
Counsel of Record
MASTERS & TAYLOR, L.C.
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106

In The Circuit Court of Mingo County, West Virginia

[145] next objection?

MR. BOLEN: The next objection which I would say would be our principle [sic] objection is with regard to instructing the jury on punitive damages. Your Honor, we think the proof in this case doesn't rise to a level that would justify a punitive damage instruction. The law in West Virginia is that in order to secure punitive damages a defendant must be shown to have engaged in a willful, wanton, reckless, malicious act, and if that's true, even in cases where fraud has been alleged, as it has been here, we don't think that this evidence rises to that level.

MR. TAYLOR: We think that is an issue for the jury. Certainly, there is a question whether they intentionally misrepresented and there's a question of whether they recklessly misrepresented and the jury can draw inferences from the total evidence to determine that issue. That's a jury issue, Your Honor.

THE COURT: I agree. Overruled. What about with regard to the apparent or ostensible agency instruction that has been offered by the plaintiff? Any objections to that language? Did you give Mr. Bolen a copy?

MR. TAYLOR: I gave him a copy before the trial, Your Honor.

* * *

[164] the Plaintiff relied upon them, then you must find for the Plaintiff. However, if you find that the Plaintiff has failed to show by clear and convincing evidence any of these elements, then, you must find for the Defendant.

c). Damages. If you find that the Plaintiff has shown by clear and convincing evidence that the Defendant acted with gross fraud, malice, oppression; or with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others, then you may assess punitive damages in addition to compensatory damages. However, if you find that the Plaintiff has met its burden in showing the elements of fraud by the Defendant, but that the Plaintiff failed to show by clear and convincing evidence that the Defendant acted with malice, then you are prohibited from assessing punitive damages and may only award compensatory damages which will be more fully explained to you hereafter.

1). Malice. In order to support a claim for punitive damages in this case, the Plaintiff must establish a high threshold of actual malice. [165] on the part of the Defendant. Actual malice means that the Defendant actually knew that that [sic] its acts or representations were false, but the Defendant nonetheless acted willfully, maliciously, recklessly or intentionally toward the Plaintiff in using those acts or representations to induce Plaintiff into entering a contract. Unless you find that the Defendant willfully, maliciously, recklessly or intentionally made false representations to induce the Plaintiff into entering into a contract, then you may not award punitive damages.

4) Breach of Oral Contract. The Plaintiff has asserted that the Defendant breached its contract with the Plaintiff. A contract is an agreement between competent parties supported by legal consideration and in the form

prescribed by law, creating an obligation on the part of one or both to do or refrain from doing some lawful thing. The essential elements of a contract are offer, acceptance and mutuality of assent.

a). Offer and Acceptance. To constitute a [166] contract there must be an offer and also an acceptance. That is, an offer, in order to become binding between the parties, must be accepted. No contract is created by a mere overture or offer not definitely assented to by both parties.

b). Mutuality of Assent. In addition to an offer and acceptance, mutuality of assent is essential to the creation of a contract. Mutual assent means that the parties to a contract have a meeting of the minds to an agreement. In order that mutuality of assent may exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by work, actions or conduct which evidences the intentions of the parties to a contract. While an identifiable offer and acceptance are the classic mechanisms for contract formation, manifestation of mutual assent may be made even though neither the offer nor acceptance can be identified and even though the moment of formation cannot be determine. [sic]

[167] c). Mutuality of Obligation. Although the essential elements of a contract are offer, acceptance and mutuality of assent, a contract implies mutual obligations. Mutuality of obligation means that there must be an undertaking on one side and consideration on the other. Consideration is defined to be a benefit to the party promising or a loss or detriment to the party to whom the

promise is made. It is some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by another. Anything which confers a benefit on the party to whom the promise is made or loss or inconvenience on the party making the promise is a valuable and sufficient consideration to support a promise. Therefore, if you the jury find that the Plaintiff, Radec, has shown by a preponderance of the evidence that the Defendant offered to hire the Plaintiff to mine the Drautz property if the Plaintiff continued mining the Radec No. 5 mine at same price paid to the Plaintiff to mine the Radec No. 4 mine for the [168] Defendant, and you find that the Plaintiff accepted this offer, then you may find that a contract existed between the Plaintiff and the Defendant for this purpose. However, if you find that the Plaintiff has failed to meet its burden in proving that the Defendant made this offer, that the Plaintiff accepted Defendant's offer and that the parties mutually assented to this agreement, then you must find for the Defendant.

d). Breach of Contract. The Plaintiff alleges that the Defendant breached its oral contract to hire the Plaintiff to mine the Drautz property after it mined the Radec No. 5 mine at the same price as the Defendant paid Plaintiff to mine the Radec No. 4 mine. A breach of contract is a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence.

Therefore, if you the jury find by a preponderance of the evidence that the Plaintiff and the Defendant entered

[169] into an oral contract whereby the Defendant agreed to hire the Plaintiff to mine the Drautz property after finishing its mining of Radec No. 5 at the same price paid to Plaintiff for mining the Radec No. 4 mine, and you further find that the Defendant failed to perform in accordance with its contract, then you must find that the Defendant breached its contract and render your verdict in favor of the Plaintiff. However, if you find by a preponderance of evidence that there was no failure to perform, then you may find for the defendant.

5) Damages

(a) When Appropriate. If you find by clear and convincing evidence that the Plaintiff has proven either its claim for fraud or by a preponderance of the evidence its claim for breach of contract, then you may award the Plaintiff damages. The Plaintiff has the burden of proving with reasonable certainty the amount of damages, if any, that it has suffered as a proximate result of the Defendant's actions. You should award the Plaintiff no greater damages than are reasonably certain to [170] compensate the Plaintiff for the damages sustained.

(b) Types of Damages. If you decide to award damages to the Plaintiff, you may consider the following:

i) Damages for Breach of Contract. In a breach of contract action, the Plaintiff, upon meeting its burden of proof, is entitled to compensatory damages. Compensatory damages recoverable by an injured party incurred through the breach of a contractual obligation are those as may be [sic] fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from the breach of the contract itself, or such as

may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach. No punitive damages may be awarded in a breach of contract claim.

ii) Damages for Fraud. The measure of [171] damages in a cause of action in fraud is any injury incurred by the Plaintiff as a result of the Defendant's fraudulent conduct. In addition to full compensation for all injuries directly or indirectly resulting from the Defendant's fraud, punitive damages may be awarded against the Defendant for willfulness, wantonness, and malice of the Defendant's wrong to the Plaintiff. However, punitive damages may only be awarded if you find that the Plaintiff has shown by clear and convincing evidence that the Defendant acted with gross fraud, malice, oppression; or with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others. Only upon a finding by you that the Plaintiff has met this burden of proof may punitive damages be assessed in addition to compensatory damages. If the Plaintiff succeeds in meeting its burden to prove fraud, but fails to show clear [172] and convincing evidence of maliciousness, oppressiveness or wanton, willful, reckless conduct, then you may only award compensatory damages.

C) Closing Instructions

1) Foreperson. Upon retiring to the jury room, you will select one of your number to act as Foreperson. The Foreperson will preside over your deliberations, and will be your spokesperson here in Court

2) Unanimity. Your verdict must represent the considered judgment of each juror. To return a verdict, each juror must agree. Your verdict must be unanimous.

3) Deliberation Process. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest

* * *

[189] Marrowbone a certain sum of money, you may also assess as part of the verdict interest at the legal rate of 10% from the date the money was due until the date of your verdict in this case.

REFUSED: MICHAEL THORNSBURY

THE COURT: Plaintiff's 40?

MR. BOLEN: We object. You've covered punitive damages repeatedly in your charge. We've objected to it, but –

MR. TAYLOR: That's fine, Your Honor. We'll withdraw it.

THE COURT: 40 will be withdrawn. Does that take care of the plaintiff?

MR. TAYLOR: Yes, Your Honor;

THE COURT: All right. Let's do the defendant. Defendant's Instruction 1?

MR. TAYLOR: Your Honor, I think Number 1 is covered; Number 2 is covered; Number 3 is covered, all in the general charge.

THE COURT: Mr. Bolen, do you have anything further to say on Defendant's 1? I think it is covered by the charge.

MR. BOLEN: I didn't pick up that the charge covered the rich or poor aspect of it.

THE COURT: 1 is refused.

IN THE CIRCUIT COURT OF MINGO COUNTY,
WEST VIRGINIA

RADEC, INC., a West Virginia corporation,

Plaintiff,

V. Civil Action No. 97-C-312

HOWARD EPPERLY, LARRY JONES, and MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a MARROWBONE DEVELOPMENT COMPANY, a West Virginia corporation,

Defendants.

PLAINTIFF'S INSTRUCTION NO. 40

(PUNITIVE DAMAGES)

You are instructed that punitive damages may be awarded against a defendant who is found to have acted maliciously, intentionally, willfully, recklessly, or extremely negligent. Such conduct includes actions taken with a conscious disregard or indifference to the rights and obligations of another. A person need not be evil or have acted with an evil purpose or design to have an award of punitive damages entered against him. Maliciousness includes not only mean-spirited conduct but also extremely negligent conduct.

Punitive damages are awarded in addition to compensatory damages and are designed to punish the defendant for committing such acts as well as for the salutary purpose of deterring the defendant and others similarly situated from committing similar acts in the future.

The decision of whether to award punitive damages and the amount of any such award is within your discretion. You are instructed that in determining the amount of any punitive damages award you should consider the following factors:

1. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages;

2. While punitive damages should bear a reasonable relationship to compensatory damages they should also bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous or defendants' actions would likely cause in a similar situation grievous harm, the damages should be greater;

3. You may consider the reprehensibility of the defendant's conduct, including how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him;

4. If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant; and

5. The financial position of the defendant is relevant inasmuch as the wealthier the defendant is the greater the amount of punitive damages should be in order to achieve the desired effect of punishing the defendant and discouraging the defendant from engaging in the same or similar acts in the future.

Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991);

Games v. Fleming Landfill, Inc., 413 S.E.2d 897 (W.Va. 1991); and

TXO Production v. Alliance Resources, 419 S.E.2d 870 (W.Va. 1992).

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(3)

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IN THE

SUPREME COURT OF THE UNITED STATES

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia corporation,
Petitioner,

versus

RADEC, INC., a West Virginia corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY TO BRIEF IN OPPOSITION

RICHARD J. BOLEN
Counsel of Record
MELISSA DODD VELTRI
HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, LLP
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722
(304) 529-6181
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

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CORPORATE DISCLOSURE STATEMENT

Petitioner Mountaineer Coal Development Company, d/b/a Marrowbone Development Company's ("Marrowbone") previously filed corporate disclosure statement appears on page ii of Marrowbone's Petition for Writ of Certiorari To The Supreme Court of Appeals of West Virginia in this case and no further disclosure is required.

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ARGUMENT

1. ANY REVIEW BY THIS COURT OF ANY PUNITIVE DAMAGE AWARD NECESSARILY ENTAILS A REVIEW OF THE FACTS.

Radec argues that Marrowbone's Petition should be denied because, under this Court's Rule 10, such Petitions are "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This same Rule 10 argument was made by Justice Ginsberg in her dissent in *BMW of N. Am., Inc.* v. *Gore,* 517 U.S. 559, 612, 116 S.Ct. 1589, 1617, 134 L.Ed.2d 809, 849 (1996). However, this argument overlooks the inherently fact-specific nature of Fourteenth Amendment review. In last week's decision in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.,* 2001 U.S. LEXIS 3520, 69 U.S.L.W. 4299 (May 14, 2001), Justice Stevens, speaking for the majority, noted that, in the Fourteenth Amendment cases in which this Court has examined whether fines or punishments are "grossly excessive", the Court has "engaged in an independent examination of the relevant criteria." Given the "inherently imprecise" constitutional line between what is and is not "grossly excessive" and given the three criteria developed by the majority of the Court in *Gore,* examination of the facts is inescapable. There is no "simple mathematical formula" and issues such as degree of reprehensibility and relationship between penalty and harm can not be assessed in a factual vacuum.

2. THIS COURT IS NOT BOUND BY ANY FINDINGS OF FACT IN THE LOWER COURT BECAUSE NONE WERE MADE.

Radec is wrong in arguing that "the Supreme Court of Appeals of West Virginia made specific factual findings in its opinion that contradicts (sic) Marrowbone's claims."

(Radec Reply at 8). To the contrary, the Supreme Court of Appeals did not make or even purport to make findings of fact. The Court included in its per curiam opinion only a very general summary of its understanding of some of the evidence — based, apparently, on Radec's brief. As Marrowbone pointed out in its Petition for Rehearing, the Supreme Court of Appeals misapprehended and misstated several material facts. *See* Appendix at 102a-104a.[1] The factual inaccuracies, lack of specificity, and lack of references to the record in the lower court's per curiam opinion all strongly support Justice Scott's conclusion that the lower court majority failed to adequately review the facts. *See* Appendix at 22a.

3. PROCEDURAL SAFEGUARDS TO PREVENT "GROSSLY EXCESSIVE" PUNITIVE DAMAGES WERE NOT FOLLOWED IN THIS CASE.

It is undisputed that the procedural safeguards required by *Pacific Mut. Life Ins. Co.* v. *Haslip,* 429 U.S.1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) and *Gore, supra,* were not followed in this case in several respects.

a. Defective jury instructions.

The jury was never told that a punitive damage award must bear a reasonable relationship to actual or compensatory damages. Apparently, as a result of that omission, the jury returned a "grossly excessive" 17 to 1 punitive damage award. *See* Justice Scott's dissent, Appendix at 20a. Radec would have this Court overlook the admitted fundamental deficiency in the jury instructions under a theory of waiver. While it is true that Marrowbone objected to any and all punitive damage instructions because the evidence did not warrant punitive damages under West Virginia law, it is also true that these objections did not cause the trial court to improperly instruct the jury. Rather, the defective instructions were drafted by the trial court and the additional punitive damage instructions initially

tendered by Radec were withdrawn by Radec before Marrowbone's counsel could even finish stating its objection. *See* Radec's Appendix at 7-8.[2] Contrary to Radec's argument and the conclusion of the lower court, Marrowbone's consistent objection to any punitive damage instructions did not constitute "invited error" for several reasons as discussed in Marrowbone's Petition for Rehearing in the lower court. *See* Appendix 95a-101a. In any event, the undisputed constitutional deficiency in the trial court's instructions should have been reviewed under the "plain error doctrine".[3] *See* discussion at Appendix 101a-102a. As Justice Scott pointed out in his dissenting opinion, errors of constitutional magnitude, such as the trial court's failure to instruct the jury as to the need for a reasonable relationship between punitive and compensatory damages, should have triggered a review under the plain error doctrine as recognized in West Virginia. *See* Appendix at 20a.

b. No meaningful and adequate review.

Neither the trial court nor the Supreme Court of Appeals made a "meaningful and adequate review" of the jury's punitive damage award as required by *Pacific Mutual, supra,* including the following inadequacies:

i. The trial court never held a hearing and never took evidence as to the last four of the nine *Garnes'* factors. *See Garnes* v. *Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1991). Thus, the trial court could not possibly have reviewed all nine of the factors required under *Garnes*. The trial court's Final Order does not even purport to address all nine of the required *Garnes'* elements. *See* Appendix 34a-36a.

ii. The trial court failed to address Syllabus Point 15 of *TXO Prod. Corp.* v. *Alliance Res. Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd 509 US 443 (1993) in its Final Order. *See* Appendix 23a-40a. That is, no consider-

ation was given to whether the punitive damage award in this action should have been limited to a 5 to 1 ratio vs. compensatory damages, or whether, on the other hand, there was evidence from which a jury could reasonably have found "actual evil intention" which is required to justify a higher ratio under *TXO*.

iii. The trial court violated the *Garnes'* requirement that the trial court "thoroughly set out the reasons for changing [or not changing] the award [punitive damage award]". 413 S.E.2d 897, 910. In lieu of citing either evidence or reasons, the trial court simply recited general and unsupported conclusions which can not be, and which have not been, reviewed on appeal. *See* Appendix 35a-36a.

iv. Although all of the foregoing deficiencies in the trial court's review were carefully pointed out to the Supreme Court of Appeals, that court ultimately did precisely the same thing which the trial court had done, i.e., failed to cite any facts or record references for its generalized rubber-stamp conclusions in support of the punitive damage award. *See* Appendix at 65a-68a. As Justice Scott noted in his dissent:

> "Had the majority of this Court engaged in a thorough and exhaustive review of all aspects of this punitive damage award, as required by *Garnes,* I cannot fathom how it could have justified its decision to affirm." *See* Appendix 22a.

The procedural safeguards put in place in *Garnes,* in response to *Pacific Mutual,* have simply been ignored in practice by the courts of West Virginia.

4. THE PUNITIVE DAMAGE AWARD IN THIS CASE WAS "GROSSLY EXCESSIVE" UNDER THE GUIDEPOSTS IN *GORE*.

a. No evidence of "trickery or deceit".

In arguing to the contrary, Radec cites "facts" which simply are not in the record. There is no evidence in the

record which could fairly be characterized as intentional infliction of economic injury as Radec argues. At best, Radec proved breach of an oral contract, but utterly failed to prove any "trickery", "deceit", or "evil" conduct on the part of Marrowbone. Radec's theory that Marrowbone was motivated by a desire to avoid losing "money to the mineral owner for unmined coal" is not supported by the record. Contrary to Radec's argument, the filing of a permit application for Drautz refutes, rather than supports, Radec's argument that Marrowbone never intended to allow Drautz to be mined.

b. The ratio of punitive damages to "actual harm" was 17 to 1, not 2 to 1.

Radec's argument that the 17 to 1 punitive damage award was not excessive "in light of the actual harm suffered by Radec" is plainly wrong. Although Radec contended at trial that it had suffered various losses, the jury did not credit Radec's arguments. The jury's compensatory damage award included only the $89,629.89 in additional rehabilitation costs incurred by Radec. Thus, the "actual harm" suffered by Radec, as found by the jury, was $89,629.89 and the ratio of punitive damages to "actual harm" was 17 to 1, not 2 to 1.

c. Marrowbone's conduct was not fraudulent, much less criminal.

The most outrageous argument contained in Radec's Brief in Opposition is that "under West Virginia Code §61-3-24(d) (1994), Marrowbone's conduct was criminal." As Radec is well aware, there has never been any criminal investigation of Marrowbone's conduct, there has never been any indictment or suggestion of indictment, and there certainly has been no conviction. Not only was Marrowbone's conduct not criminal, but no one until now has ever contended to the contrary. (Radec makes this argument for the first time in its Brief in Opposition which it just filed

in this Court.) It is true that West Virginia Code §61-3-24 allows prosecution for false promises as to which the state can prove beyond a reasonable doubt that the defendant had a fraudulent intent at the time the promise was made. *See State* v. *Moore,* 166 W.Va. 97, 273 S.E.2d 821 (1980). However, proof of fraudulent intent at the time of the making of a false promise "must be shown by 'something more than mere proof of non-performance or actual falsity.' " 273 S.E.2d 821, 825. The state must prove that the promisor at the time the promise was made had an "intent to cheat, defraud, or deceive." 273 S.E.2d 821, 825. There is no evidence that Marrowbone at any time harbored an "intent to cheat, defraud, or deceive" Radec. Radec deposed every conceivable witness, combed through boxes of Marrowbone documents and never produced a single witness or document at trial proving or even suggesting that Marrowbone engaged in deliberate fraud or had any "intent to cheat, defraud, or deceive." To the contrary, Radec's counsel conceded in his closing argument to the jury that Marrowbone "may have had good intentions." (Trial Transcript, Vol. 5, at p. 7).

[1] References herein to the "Appendix" are references to the Appendix of Marrowbone's Petition for Writ of Certiorari To The Supreme Court of Appeals of West Virginia which was previously filed in this case.

[2] References herein to "Radec's Appendix" are references to the Appendix of Radec's Brief in Opposition which was previously filed in this case.

[3] The "plain error" doctrine has been recognized by a majority of the federal circuits. *See* Moore's Federal Practice §51.21(2).

Respectfully submitted,

RICHARD J. BOLEN
Counsel of Record
MELISSA DODD VELTRI
HUDDLESTON, BOLEN, BEATTY,
PORTER & COPEN, LLP
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722
(304) 529-6181

Counsel for Petitioner Mountaineer Coal Development Company, d/b/a Marrowbone Development Company